No. 05-83
Title: Washington, Petitioner
v.
Arturo R. Recuenco
Docketed: July 15, 2005
Lower Ct: Supreme Court of Washington
Case Nos.: (74964-7)
Decision Date: April 14, 2005

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 13 2005	Petition for a writ of certiorari filed. (Response due August 15, 2005)
Aug 11 2005	Brief of respondent Arturo R. Recuenco in opposition filed.
Aug 11 2005	Motion for leave to proceed in forma pauperis filed by respondent.
Aug 24 2005	DISTRIBUTED for Conference of September 26, 2005.
Aug 25 2005	Reply of petitioner Washington filed. (Distributed)
Oct 3 2005	DISTRIBUTED for Conference of October 7, 2005.
Oct 11 2005	DISTRIBUTED for Conference of October 14, 2005.
Oct 17 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 17 2005	Petition GRANTED.
Nov 17 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 14, 2005.
Nov 17 2005	Extension of time within which to file respondent's brief on the merits to and including January 18, 2006.
Dec 7 2005	Motion to appoint counsel filed by respondent Arturo R. Recuenco.
Dec 12 2005	Brief amicus curiae of United States filed.
Dec 14 2005	Joint appendix filed.
Dec 14 2005	Brief of petitioner Washington filed.
Dec 14 2005	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Dec 14 2005	Brief amici curiae of Alabama, et al. filed.
Dec 21 2005	Motion DISTRIBUTED for Conference of January 6, 2006.
Jan 9 2006	Motion to appoint counsel filed by respondent GRANTED. Gregory C. Link, Esquire, of Seattle, Washington is appointed to serve as counsel for the respondent in this case.
Jan 18 2006	Brief of respondent Arturo R. Recuenco filed.
Jan 18 2006	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jan 23 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Feb 17 2006 Reply of petitioner Washington filed.

Feb 21 2006 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Mar 6 2006 SET FOR ARGUMENT on Monday, April 17, 2006.

Mar 17 2006 CIRCULATED.

Mar 27 2006 Record received from Supreme Court of Washington. (1 box)

Apr 17 2006 Argued. James M. Whisman, Senior Deputy Prosecuting Attorney, Seattle, Wash.; and Patricia A. Millett, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Gregory C. Link, Seattle, Wash. (Appointed by this Court.)

(2)

Supreme Court, U.S.
FILED

No. 05-83 JUL 13 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A single element missing or misdefined in jury instructions can be harmless error if, beyond a reasonable doubt, the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1 (1999). In contrast, errors that affect the entire framework within which a trial proceeds, rather than errors in the trial process itself, are "structural" and will always invalidate a conviction. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

It is undisputed in this assault case that the only weapon used was a firearm, but the verdict form for the enhancement failed to distinguish a "firearm" finding from a more generic "deadly weapon" finding—the "firearm" finding carries a greater sentence.

The question presented here is whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement.

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IN THE

Supreme Court of the United States

No. ___

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

The King County Prosecuting Attorney, on behalf of the people of the State of Washington, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at *State v. Recuenco*, 154 Wash. 2d 156, 110 P.3d 188 (Apr. 14, 2005). App. A (1a-8a)[1]. The Court of Appeals decision in this case is unpublished, 117 Wash. App. 1079, 2003 WL 21738927, Wash. App. Div. 1, Jul 28, 2003, and is reproduced in the appendix to this petition. App. B (9a-19a).

[1] "App." refers to the Appendix to this Petition For A Writ Of Certiorari.

JURISDICTION

The Washington Supreme Court's judgment was entered on April 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents a question under the Fifth and Fourteenth Amendments of the Federal Constitution.

STATEMENT OF THE CASE

A. The Crime.

The material facts of the crime are not disputed. Recuenco angrily accosted his wife in an argument and threatened her with a gun. Police were summoned, the gun was recovered immediately following the incident, and it was admitted as an exhibit at trial. Recuenco conceded that the gun was his and admitted that he held it in his hand just after the assault, but he denied pointing the gun at his wife to assault her. There was no evidence of any other weapon in the assault.

B. Charges, Instructions, and Verdict.

Recuenco was charged, inter alia, with assault in the second degree. The assault charge included a special deadly weapon allegation that would support an enhanced sentence if found by a jury. The charging document specifically alleged that the assault was committed with a deadly weapon, "to wit: a handgun." Under Washington law, a "firearm" finding carries a three-year enhanced sentence. If the jury finds, on the other hand, that the offender was armed with "a deadly weapon other than a firearm," a one-year sentence enhancement is imposed. Wash. Rev. Code § 9.94A.510(3)(b), (4)(b).

After all the evidence was received, the court conferred with counsel regarding jury instructions. With regard to the weapon instruction, the Court said, "Counsel, quite frankly

there is no dispute in this case that we are talking about a gun . . ." 8RP 797. Defense counsel did not dispute that observation. Counsel later commented that, "In this case, the allegation and the basis on which this case was tried was under the theory of firearm." 8RP 902. Counsel argued for a different definition of the term "firearm" than was provided by the court but he did not dispute that the weapon at issue was a gun. 8RP 798-99. In fact, defense counsel argued that the crime of "Aiming a Firearm" should be submitted as a lesser included offense instruction. 8RP 803-09.

The jury was instructed that to convict the defendant of the crime of assault in the second degree, the State must prove beyond a reasonable doubt that "on or about September 18, 1999, the defendant intentionally assaulted Amy Recuenco with a deadly weapon . . ." (Instruction No. 8). The court also instructed the jury that "[t]he term "deadly weapon" includes any firearm." (Instruction No. 9).

Regarding the special verdict that would trigger an enhanced sentence, the court instructed as follows:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree as alleged in Count I.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

(Instruction No. 18). The jury was instructed to return the special verdict form only if it was unanimous. (Instruction No. 20). Recuenco proposed an identical verdict form.

Arguments of the lawyers tracked these weapon instructions. The prosecutor's closing argument focussed on the defendant's use of a gun. 9RP 822-34. Likewise, defense counsel's closing argument repeatedly referred to the gun as the weapon alleged in the assault. *See, e.g.*, 9RP 838. The

jury found the defendant guilty of assault in the second degree, and returned the special verdict form finding that he was armed with a "deadly weapon" in the commission of assault in the second degree.

During the defendant's post-trial motion to vacate the jury verdict, defense counsel stated, ". . . Your Honor, the firearm is an element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury." 11RP 912-13. Even though there was no question that a firearm had been proved, counsel asked the cour to impose a lesser deadly weapon enhancement rather than a firearm enhancement. The trial court rejected this request, and imposed sentence for use of a firearm.

C. Appellate Review.

Recuenco challenged the weapon finding on appeal. The Washington Court of Appeals, relying on *Neder v. United States*, 527 U.S. 1 (1999), held that any error in crafting the special verdict form was harmless beyond a reasonable doubt. App. B (17a-19a).

The Washington Supreme Court granted review and considered Recuenco's case together with three consolidated cases raising numerous issues pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). *See State v. Hughes*, 154 Wash. 2d 118, 110 P.3d 192 (2005). (20a-27a) (Excerpt of harmless error portion of *Hughes*). The court's opinion in *Hughes* contains most of the analysis of the harmless error issue challenged in this petition. The *Recuenco* decision simply cites the analysis in *Hughes*.[2] App. A (8a)

In *Recuenco*, the court reversed the sentencing enhancement, finding that pursuant to *Blakely v. Washington*, 542

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[2] Although a motion to reconsider is pending in *Hughes*, the motion does not challenge the harmless error holding, so that aspect of the opinion is final.

U.S. 296 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Recuenco's Sixth Amendment right to a jury verdict had been violated when the judge, not the jury, made the "firearm" determination.[3] App. A (5a-7a). The court applied its holding from *Hughes* that *Blakely*-type error was structural error, equivalent to the error in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), because the jury's failure to render a verdict on the "firearm" question meant that there was no "object" upon which to conduct harmless error analysis. *State v. Recuenco*, App. A (8a). *State v. Hughes*, App. C (22a-23a). The Washington Supreme Court thus concluded that harmless error review was impossible. It expressly distinguished *Neder*, holding that *Neder* did not apply to errors pursuant to *Blakely* or *Apprendi*. App. C (26a-27a).

Accordingly, the court in *Recuenco* reversed the "firearm" sentence and remanded for the ministerial act of imposing a shorter sentence using the generic "deadly weapon" enhancement. App. A (8a).

There was no state constitutional basis for this decision. In fact, prior to *Blakely* and *Apprendi*, the Washington Supreme Court repeatedly found harmless error where deadly weapon enhancements were misdefined, even where the burden of proof was misstated. *See, e.g., State v. Fowler*, 114 Wash. 2d 59, 785 P.2d 808 (1990). The *Recuenco* court's decision rested wholly on its belief that *Sullivan v. Louisiana* precluded harmless error analysis for Sixth Amendment sentencing error.

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[3] The State argued that any error was invited by the defendant's proposed instructions but the Court rejected the invited error argument. That ruling rests on Washington law, presents no federal question, and thus is not challenged in this petition. Similarly, this petition does not present the myriad, and transitory, "plain error" questions now pending in the federal courts of appeal under Fed. R. Crim.P.52(b). *See United States v. Rodriguez*, 406 F.3d 1261 (11th Cir. 2005), *cert. denied*, ___ U.S. ___, 2005 WL 483174, 73 USLW 3531 (U.S. June 20, 2005) (No. 04-1148).

REASONS FOR GRANTING THE PETITION

This case is an excellent vehicle for resolving an important federal constitutional question under the Fifth and Fourteenth Amendments regarding the scope of harmless error analysis, *Chapman v. California*, 386 U.S. 18, 20-21 (1967), and upon which there is a conflict and substantial controversy. Supreme Court Rule 10(b), (c). The general criteria for granting certiorari of a state court case are met. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, 271-72 (8th ed. 2002).

First, the ability of an appellate court to find harmless error is analyzed in Washington under the Federal Constitution, *State v. Brown*, 147 Wash. 2d 330, 340-41, 58 P.3d 889 (2002), and is a substantial question under the Federal Constitution. Recent Washington Supreme Court decisions, as well as the recent decision from the North Carolina Supreme Court in *State v. Allen*, (2005 WL 1539186 at *11-17), ___ S.E.2d ___ (N.C. 2005), make it clear that these state courts believe *Sullivan v. Louisiana* precludes harmless error analysis on *Apprendi* and *Blakely* error.

Second, the Washington Supreme Court's decision conflicts with this Court's decisions, with federal appellate courts' decisions, and with decisions of other state supreme courts. Review by writ of certiorari to a state supreme court is appropriate under such circumstances to determine whether the Washington Supreme Court "has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, at 273(j) (citing cases including *Bullington v. Missouri*, 451 U.S. 430, 431 (1981) (certiorari granted on issue whether reasoning of prior Court precedent also applies to different kind of sentencing hearing) and *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read Miranda too broadly")).

Third, there is disagreement in the federal and state courts over whether *Blakely* error is structural error that is subject to harmless error analysis, even outside the "plain error" context.

Finally, the mode of analysis used by the Washington Supreme Court will have continuing, not simply transitory, impact on harmless error analysis in any state with a mandatory sentencing guidelines structure under which aggravating factors are submitted to a jury. Under such a system, mistakes in instructing the jury on sentencing enhancements will occur, and courts need to know whether harmless error analysis is possible for such mistakes. In this way, the issue here is much different from the largely transitory post-*Booker*[4] "plain error" litigation that is currently sweeping the federal courts.

For these reasons, review by this Court is appropriate.

A. Conflict with This Court's Precedent.

The *Recuenco* decision conflicts with several decisions of this Court on an important question of federal constitutional law, resulting in an improper application of this Court's precedent.

Neder was a tax fraud prosecution wherein the jury was told that it did not need to find that a misstatement in a tax return was "material." Thus, the jury's verdict did not address this issue. Neder claimed that failure of the jury to render a verdict on this element violated his right to a jury trial, and was not subject to harmless error analysis.

This Court rejected Neder's arguments, reaffirming that "most constitutional errors can be harmless." *Neder*, 527 U.S. at 8 (citing *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). The Court held that misdefining or omitting an ele-

[4] *United States v. Booker*, ___ U.S., ___, 125 S.Ct. 738 (2000).

ment of the crime could be harmless, and rejected comparisons to *Sullivan v. Louisiana*. In particular, the Court narrowly interpreted *Sullivan*, limiting its holding to situations wherein the jury's verdict was completely vitiated by error. *Neder*, 527 U.S. at 11. The Court rejected the argument that a missing or misdefined element created a "gap" that could never be filled by harmless error analysis. *Id.* at 13-14. ". . . [T]he absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Id.* at 12. But that conclusion does not establish that harmless error is impossible.

This Court ultimately concluded that the facts in *Neder* clearly illustrated that a harmless mistake had occurred in trial of the case. Underreporting $5 million in income was obviously material, materiality was never in dispute at trial, so any error was harmless. *Neder*, at 15.

More recently, in *Mitchell v. Esparza*, 540 U.S. 12 (2003), harmless error analysis applied even in a capital case. Esparza was charged with capital murder committed during the course of a robbery. The charging document and jury instructions failed to allege that Esparza was the "principal offender"—a requirement for imposing the death penalty under Ohio law. Esparza argued on appeal that this error precluded imposition of the death penalty but Ohio courts found the error harmless. The Eighth Circuit Court of Appeals reversed, reasoning that "failure to charge in the indictment that respondent was a principal was the functional equivalent of 'dispensing with the reasonable doubt requirement'". . . (citing *Sullivan v. Louisiana*). *Esparza*, 540 U.S. at 16.

This Court reversed the Eighth Circuit in a per curiam opinion:

> . . . In noncapital cases, we have often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-

> error analysis. *E.g.*, *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996) *(per curiam)*; *Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) *(per curiam)*; *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). In *Neder*, for example, we held that such an error "differs markedly from the constitutional violations we have found to defy harmless-error review." 527 U.S., at 8, 119 S.Ct. 1827. In so holding, we explicitly distinguished *Sullivan* because the error in *Sullivan*—the failure to instruct the jury that the State must prove the elements of an offense beyond a reasonable doubt—"'vitiat[ed] *all* the jury's findings,'" 527 U.S., at 11, 119 S.Ct. 1827, whereas the trial court's failure to instruct the jury on one element of an offense did not, *see id.*, at 13-15, 119 S.Ct. 1827. Where the jury was precluded from determining only one element of an offense, we held that harmless-error review is feasible. *Ibid.*

Esparza, 540 U.S., at 16-17 (italics in original). This Court further held that, because Esparza was the sole participant alleged to have committed the robbery and murder, the Ohio court's harmless error determination was not unreasonable. *Esparza*, 540 U.S. at 18.

Thus, this Court's precedents clearly provide that harmless error analysis is appropriate even if the trial court completely omitted an element of the crime from a jury instruction or charging document. It is also clear that the broader language in *Sullivan v. Louisiana*, suggesting that any gap in the jury instructions could not be filled by a harmless error analysis, has been limited by *Neder*.

It follows that the error in the present case, failure to use a sufficiently precise special verdict form on the nature of a sentencing factor, should be subject to harmless error analysis. The weapon enhancement is a sentencing factor, not an

element of the crime. Although sentencing factors are the "functional equivalent" of elements for Sixth Amendment purposes,[5] they surely are not of *greater* significance than an element of the crime. Misdefining a sentencing enhancement no more vitiates the entire jury verdict than does omitting an element of the crime. Thus, it would be incongruous to permit harmless error analysis as to a missing element, but to prohibit such analysis as to a misdefined sentencing factor.

Recuenco (and *Hughes*) are simply inconsistent with *Neder*. It thus appears that the Washington Supreme Court has not "properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, at 273(j). Review should be granted to correct this conflict between this Court's precedents and the erroneous interpretation of the federal constitution by the Washington Supreme Court. Supreme Court Rule 10(c).

B. Conflict with the Circuit Courts of Appeal.

The Washington Supreme Court's analysis relies on a decision of the U.S. Court of Appeals for the Ninth Circuit—a decision that conflicts with decisions of all the other federal courts of appeal, illustrating the need for review by this Court.

The Washington Supreme Court relied upon *United States v. Jordan*, 291 F.3d 1091 (9th Cir. 2002), in holding that a Sixth Amendment sentencing error can never be harmless. *See State v. Hughes*, App. C (24a-25a). In *Jordan*, drug quantity was not proved to a jury beyond a reasonable doubt, yet Jordan's sentence was increased based on the quantity of drugs possessed. Accordingly, the Ninth Circuit found a Sixth Amendment violation. Because the error was preserved at sentencing, it was to be reviewed for "harmless error" rather than "plain error." *Jordan*, at 1095. Regarding harmless

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[5] *Apprendi*, 530 U.S. at 494 n. 19.

error analysis, the Ninth Circuit expressed uncertainty over how to proceed:

> As there is little judicial experience on this issue, *it is not perfectly clear how to analyze whether* Apprendi *error is harmless*. . . . We see two analytical options: One is that we might look only at the sentence received to see if it is greater than the maximum sentence the defendant should have faced. The other is that, instead, we might canvass the record to see whether, had the defendant been properly indicted and the jury properly instructed, we could say beyond any reasonable doubt that the defendant would have been found guilty of the more severely punishable crime.

Id. (citations omitted; italics added). The court then held that it would be impossible to determine whether error was harmless where the aggravating factor was neither pled nor proved to a jury. *Id.* at 1096-97. Although the court did not expressly find the error to be "structural," it appears to have adopted a de facto structural error analysis for Sixth Amendment errors, similar to that employed by this Court in *Sullivan v. Louisiana*. If this is the intended holding of the Ninth Circuit, that circuit stands alone.

Yet, more recent authority from the Ninth Circuit casts doubt upon whether that court intends harmless error analysis to apply to post-*Apprendi* questions. In *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005), the court, sitting en banc, decided to permit limited remands in "plain error" cases. The court noted, however, that "[a] different analysis will apply when a defendant preserves his Sixth Amendment claim by challenging the sentencing guidelines on constitutional grounds before the district court." *Ameline*, at 1078 n.1 (citing cases that permit harmless error analysis). Thus, the Ninth Circuit is inconsistent on whether it will permit harmless error analysis for such errors.

In any event, it is clear that every other circuit rejects the notion that Sixth Amendment sentencing errors are structural errors. The First Circuit, for example, recently rejected a claim that *Apprendi* error is structural error. *United States v. Antonakopoulos*, 399 F.3d 68, 80 n. 11 (1st Cir. 2005) ("plain error" case). *See also United States v. Mojica-Baez*, 229 F.3d 292, 309-10 (1st Cir. 2000) (holding that a failure to allege the precise nature of a weapon was not structural error; error did not so "interfere with such basic and fundamental constitutional protections that they go to the structure of our criminal law system").

The Second Circuit has held that *Blakely* error is subject to harmless error analysis. *United States v. Mincey*, 380 F.3d 102, 105 (2nd Cir. 2004) (per curiam), *vacated and cert. granted by Ferrell v. United States*, 125 S.Ct. 1071 (2005); *United States v. Friedman*, 300 F.3d 111, 127-28 (2nd Cir. 2002), *cert. denied*, 538 U.S. 981, 155 L. Ed. 2d 672 (2003) (*Apprendi* error).

The Third Circuit rejected the "structural error" argument in the context of a plain error analysis, holding that not all *Apprendi* error is per se prejudicial. *United States v. Vazquez*, 271 F.3d 93, 102-03 (3rd Cir. 2001).

Likewise, the Fifth Circuit has held in *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002), that *Apprendi* error is subject to harmless error analysis. Matthews received a court-imposed aggravated sentence based on a "street gang" finding. The Fifth Circuit found error in the judge, not the jury, making the finding, but the court concluded that such error was simply instructional error, and thus subject to harmless error analysis. *Matthews*, at 665. The court expressly rejected the notion that such error could never be harmless. *Id.* It found that evidence of gang involvement was "extensive, overwhelming, and essentially uncontradicted" in that case. *Id.*

The Sixth Circuit has also held that *Apprendi* error is not structural error, and thus is subject to harmless error analysis. *See United States v. Campbell*, 364 F.3d 727, 737 (6th Cir. 2004) (drug quantity), and *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003) (same).

The Seventh Circuit has observed that "judicial resolution of a factual dispute that should have been presented to a jury is not a 'structural error' that requires automatic reversal" because "juries are not necessarily more accurate than judges at finding facts." *Knox v. United States*, 400 F.3d 519, 523 (7th Cir. 2005) (citing *Schriro v. Summerlin*, 542 U.S. 348 (2004)).

The Eighth Circuit has held in a number of contexts that *Apprendi* error is not structural. *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005) (en banc) (failure to charge one statutory aggravating factor in capital case is not structural error); *United States v. McDonald*, 336 F.3d 734, 738 (8th Cir. 2003) (drug quantity not proved to jury is subject to harmless error analysis) (citing *United States v. Anderson*, 236 F.3d 427 (8th Cir. 2001)).

The Tenth Circuit also applies harmless error analysis to preserved *Blakely* claims. *See United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005).

The Eleventh Circuit is in accord with these other circuits. In *United States v. Rodriguez*, 406 F.3d 1261 (11th Cir. 2005), *cert. denied*, __ S. Ct. ___, 2005 WL 483174, 73 USLW 3531 (U.S. Jun 20, 2005) (No. 04-1148), the district court judge had ruled, using reasoning similar to that of the Washington Supreme Court, that *Booker* error was a "structural" defect that precluded analysis of the facts of each case. The Court of Appeals rejected this approach, correctly noting that "none of the eleven other circuits to address *Booker* plain error issues have taken such an extreme approach." *United States v. Rodriguez*, 406 F.3d at 1263-64. The court held that

Booker error was not akin to the structural error noted in *Sullivan v. Louisiana. Id.*

The D.C. Circuit, too, agrees that post-*Apprendi* error is not structural. *United States v. Lafayette*, 337 F.3d 1043, 1052 (D.C. Cir. 2003).

Thus, *Recuenco* conflicts with nearly every federal circuit court of appeal Review is appropriate under Supreme Court Rule 10(b).

C. Conflict with State Appellate Courts.

At least eight state courts of last resort have applied harmless error analysis to Sixth Amendment sentencing error but there appears to be confusion in some intermediate appellate courts as to whether *Neder* is properly applied to such errors post-*Apprendi*. And now both the Washington and the North Carolina Supreme Courts have held that harmless error is impossible in post-*Apprendi* and post-*Blakely* cases.

Many state supreme courts have applied harmless error analysis. *See e.g. State v. Henderson*, 209 Ariz. 300, 100 P.3d 911 (2004) (holding that *Blakely* error in judicial findings of aggravating facts is not structural error and that "every federal circuit court has . . . been uniform in holding that *Apprendi* error can be reviewed for harmless error"); *People v. Sengpadychith*, 26 Cal. 4th 316, 109 Cal. Rptr. 2d 851, 27 P.3d 739 (2001) (gang enhancement found by judge is subject to harmless error analysis); *State v. Davis*, 255 Conn. 782, 793-94, 772 A.2d 559, 567-68 (2001) (firearm finding by judge rather than jury was harmless error); *People v. Thurow*, 203 Ill. 2d 352, 362-71, 786 N.E.2d 1019, 1025-29 (2003) (judicial finding of "household member" aggravator was harmless error—but doubts about *Neder* are discussed); *State v. Burdick*, 782 A.2d 319, 327-28 (Me. 2001) (sentencing factor depending on attempted murder victim's identity as a police officer decided by judge, not jury; court rejects "struc-

tural error" arguments in context of state court's plain error analysis); *Clark v. State*, 621 N.W.2d 576, 581 (N.D. 2001) (judicial decision on firearm aggravator was harmless error where defendant conceded possession of the firearm); *Teague v. Palmateer*, 184 Or. App. 577, 590, 57 P.3d 176, 186 (2002) (recognizing that most courts have found *Blakely* error subject to harmless error analysis and thus concluding that it is not a watershed change in the law); *State v. Gordon*, 262 Wis. 2d 380, 663 N.W. 2d 765 (2003).

In addition to the Washington Supreme Court, however, the North Carolina Supreme Court recently decided that harmless error analysis is never appropriate as to Sixth Amendment sentencing error. *See State v. Allen*, (2005 WL 1539186 at *11-17.), ___ S.E.2d ___ (N.C. 2005). The *Allen* court essentially adopted the analysis of the *Hughes* court, and held that harmless error could never be applied where the jury failed to consider a sentencing factor. *Id.* at *16.

The dissenting North Carolina justices argued at length that the majority decision jeopardized an important federal constitutional doctrine that serves as an anchor in modern appellate and criminal law jurisprudence. *Id.* at *18-20 (Martin, J., concurring in part and dissenting in part). The dissent also cogently explained the theoretical basis for harmless error analysis in this context, and illustrated the irreconcilable conflict between the majority's decision and this Court's precedents. *Id.* at *23-28. Finally, the dissenting opinion lists much of the caselaw touching on this subject in the federal and state courts. *Id.* at *28 n. 13, n. 15. Still, in the face of all these arguments, the majority held that harmless error was impossible.

Several state appellate courts also continue to express doubts about *Neder*'s vitality, or at least its application to *Blakely* error. For example, the majority opinion from the Illinois Supreme Court in *Thomas* found harmless error but

questioned whether *Neder* would be overruled. *Thurow*, 786 N.E.2d at 1025-29. *See also Thurow*, 786 N.E.2d at 1032-33 (Kilbride, J., dissenting—arguing that Sixth Amendment sentencing error can never be harmless), *Cf. Thurow*, at 1030-31 (Freeman, J., specially concurring in the opinion—finding that *Apprendi* and *Neder* can be harmonized). *See also State v. Nitz*, 353 Ill. App. 3d 978, 994-99, 820 N.E. 2d 536, 553-55 (2004) (questioning the continued vitality of *Neder*).

In another decision, an intermediate Indiana appellate court questioned the validity of *Neder* and cited to the Washington Supreme Court's *Hughes* decision as authority for the claim that *Blakely* error can never be harmless. *See Freeze v. State*, 827 N.E. 600, 604-05 (Ind. Ct. App. 2005) (discussing *Blakely* error under *Neder* and *Sullivan*).

Although the Arizona Supreme Court has applied harmless error in the *Blakely* context, *Henderson, supra*, Arizona appellate court judges have questioned whether *Blakely* error is structural. *See State v. Estrada*, 108 P.3d 261, 279 (Ariz. Ct. App. 2005) (Kessler, dissenting); and *State v. Resendis-Felix*, 100 P.3d 457, 461 (Ariz. Ct. App. 2004) (Eckerstrom, concurring).

Likewise, two judges on a three-judge panel of the Washington Court of Appeals held, before *Hughes* was decided, that *Blakely* error was structural. *See State v. Fero*, 125 Wash. App. 84, 104 P.3d 49 (2005).

Finally, it should be noted that the *Recuenco* decision is now the *third* Washington Supreme Court opinion holding that *Apprendi*-style error is structural error. *See State v. Thomas*, 150 Wash.2d 821, 849-50, 83 P.3d 970 (2004). Given these conflicting approaches in the state appellate courts, and given that there is a clear split of authority from two separate state courts of last resort, review by this Court is appropriate. Supreme Court Rule 10(b).

D. The Washington Supreme Court's Erroneous Interpretation of the Federal Constitution Creates a Continuing Analytical Difficulty, Not Just the Transitory Disruption Occurring in the Federal Courts on Similar Sixth Amendment Sentencing Claims.

Unlike many post-*Blakely* plain error or harmless error cases, the issues presented by the *Hughes* and *Recuenco* decisions will not abate over a short period of time. This decision precludes harmless error analysis on *any* type of instructional sentencing enhancement error, even where a jury passed on some aspect of the enhancement.

In the federal courts and in many states, post-*Blakely* or post-*Booker* cases will be processed through the appellate courts over the course of the next year or so. But states like Washington, which have authorized jury trials for aggravating factors, will continue to submit innumerable sentencing questions to juries through special verdict forms and interrogatories. Wash. Rev. Code § 9.94A.535. For instance, juries will be asked to decide whether a crime was committed with "deliberate cruelty" or against a "particularly vulnerable victim." Wash. Rev. Code § 9.94A.535(3)(a), (b). Under the *Recuenco* and *Allen* decisions, states like Washington and North Carolina will be precluded by the Federal Constitution from conducting harmless error analysis if any mistake is made in instructing the jury on these sentencing enhancements.

This continuing problem will perpetuate the anomalous results in *Recuenco* and *Allen*, whereby harmless error is possible where an *element* is wholly omitted, but impossible if a *sentencing factor* is omitted, or even just misdefined.

CONCLUSION

This Court should grant certiorari to decide this important federal question. The Washington State Supreme Court's decision is based on federal constitutional law, conflicts with this Court's decision in *Neder*, conflicts with numerous decisions of the United States Courts of Appeal, and conflicts with decisions from courts of last resort in the states. Moreover, as evidenced by the Ninth Circuit's decision in *Jordan*, and by various state appellate court decisions, a split exists over whether *Neder* harmless error analysis is appropriate post-*Apprendi* and post-*Blakely*. This issue will be a continuing problem in any jurisdiction that has maintained a mandatory guidelines system where sentencing enhancements will be decided by juries.

This case is an excellent vehicle for resolving this important federal constitutional question, as the issue was preserved below, the material facts are not in dispute, the error alleged is conceded, and the harmlessness of that error is palpable.

Review is appropriate pursuant to Supreme Court Rule 10.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF WASHINGTON,
En Banc

No. 74964-7

STATE OF WASHINGTON,
Respondent,

v.

ARTURO R. RECUENCO,
Petitioner.

Argued Nov. 9, 2004
Decided April 14, 2005

Background: Defendant was convicted by jury in the Superior Court, King County, Linda Lau, J., of second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. The jury also returned a true finding on a deadly weapon enhancement allegation, and the trial court imposed a sentence enhancement based on defendant's being armed with a firearm. The Court of Appeals affirmed. Review was granted.

Holdings: The Supreme Court, Fairhurst, J. held that:

(1) imposition of firearm enhancement, absent jury finding, violated defendant's Sixth Amendment jury trial right as defined by *Blakely v. Washington*, abrogating *State v. Meggyesy*, 90 Wash.App. 693, 958 P.2d 319, *State v. Rai*, 97 Wash.App. 307, 983 P.2d 712, and *State v. Olney*, 97 Wash.App. 913, 987 P.2d 662; (2) error was not invited; and (3) *Blakely* error can never be deemed harmless.

Reversed and remanded.

Proper remedy for trial court's error in imposing sentence enhancement based on defendant's being armed with a firearm, absent jury finding supporting such enhancement, which error violated defendant's Sixth Amendment jury trial right as defined by *Blakely v. Washington*, was remand for resentencing based solely on deadly weapon enhancement, which was supported by jury's special verdict, as Supreme Court would not imply a procedure by which jury could find sentencing enhancements on remand. U.S.C.A. Const. Amend. 6; West's RCWA 9.94A.533, 9.94A.602. Gregory Charles Link, Washington Appellate Project, Rita Joan Griffith, Seattle, for Petitioner. James Morrissey Whisman, King County Prosecutor's Office, Seattle, for Respondent. James Elliot Lobsenz, Carney Badley Spellman, Seattle, for Amicus Curiae Wash. Ass'n of Criminal Defense Lawyers.

FAIRHURST, J.

Arturo Recuenco was charged with second degree assault with a deadly weapon enhancement because he assaulted his wife while holding a gun. At trial, the jury returned a guilty verdict on the assault charge and a special verdict that Recuenco was armed with a deadly weapon. But the trial court imposed a sentence enhancement based on Recuenco's being armed with a firearm, which was greater than that for a deadly weapon. This court granted review to consider whether imposition of a firearm enhancement without a jury finding that Recuenco was armed with a firearm beyond a reasonable doubt violated Recuenco's Sixth Amendment right to a jury trial as defined by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny. As per our reasoning in *State v. Hughes*, No. 74147-6, — Wash.2d —, 110 P.3d 192, 2005 WL 851137 (Wash. April 14, 2005), we hold that the trial court's imposition of the firearm enhancement violated Recuenco's Sixth Amendment right to a jury trial. We reverse the Court of Appeals, vacate Recuenco's sentence, and remand for resentencing based on the

one-year deadly weapon enhancement supported by the jury's special verdict.

I. FACTUAL AND PROCEDURAL HISTORY

Based on allegations that Recuenco became upset with his wife for not cooking for his relatives, smashed their stove, and threatened her with a gun, the King County prosecutor charged Recuenco with second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. The information further charged Recuenco with "being armed with a deadly weapon, to-wit: a handgun, under the authority of RCW 9.94A.125 and 9.94A.310."[1] Clerk's Papers (CP) at 159.

The trial court submitted the following special verdict form to the jury: "Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?" CP at 237. Defense counsel did not object to that special verdict form; in fact, he proposed an identical one. And the prosecutor never requested use of a special verdict form regarding the presence of a firearm. To the contrary, when defense counsel argued that the definition of firearm should have been submitted to the jury to explain the deadly weapon definition, the prosecutor explicitly stated, "[t]he method under which the state is alleging and the jury found the assaults committed was by use of a deadly weapon." 11 Verbatim Report of Proceedings (RP) at 909. The prosecutor further stated, "in the crime charged and the enhancement the state alleged, there is no elements [sic] of a firearm. The element is assault with a deadly weapon." 11 RP at 910.

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[1] These provisions have been recodified as RCW 9.94A.602 and RCW 9.94A.533 respectively. For simplicity, the current versions are used in this analysis.

The jury convicted Recuenco of second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. The jury also returned a special verdict that Recuenco had been armed with a deadly weapon. The jury was not asked to, and therefore did not, return a special verdict that Recuenco committed the assault while armed with a firearm.

The standard range sentence for count I, the assault, was three to nine months. The deadly weapon enhancement would have added one mandatory year, while a firearm enhancement would have added three mandatory years. RCW 9.94A. 533(3)(b), (4)(b).

At the sentencing hearing, the prosecutor requested the low end of the standard range sentence for count I: 3 months, with a 36-month enhancement for use of a firearm. The prosecutor further requested that the court suspend time on the other two counts. Defense counsel agreed with a base sentence at the low end of the standard range for count I, but refuted the proposed 36-month enhancement, arguing that the prosecutor would have had to allege and prove that Recuenco was armed with a firearm, and that the jury would have had to return a firearm special verdict. The court imposed a 39-month sentence for the assault conviction, including 36 months for being armed with a firearm, reasoning that it had "no discretion but to impose the statutorily mandated term with regard to the deadly weapon enhancement." 11 RP at 928. The court further imposed 1 year and 90 days for counts II and III but suspended those sentences.

Recuenco appealed his conviction and sentence arguing, among other things, that he was deprived of due process because a firearm enhancement was imposed without notice, proof beyond a reasonable doubt, and a jury finding. In an unpublished opinion, the Court of Appeals found against Recuenco on each issue and held that even if the failure of the jury's finding a firearm deprived Recuenco of his right to a

jury trial as defined by *Apprendi* (which it assumed without deciding), any error was harmless. *See State v. Recuenco*, noted at 117 Wash.App. 1079, 2003 WL 21738927, at *5.

Recuenco petitioned this court for discretionary review. The United States Supreme Court subsequently decided *Blakely v. Washington*,— U.S.—, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which Recuenco submitted as additional authority. We granted review as to the *Apprendi/Blakely* issues only. *State v. Recuenco*, 152 Wash.2d 1001, 101 P.3d 865 (2004).

II. ISSUES

1. Did the trial court's firearm sentence enhancement violate Recuenco's Sixth Amendment right as defined by *Apprendi* and *Blakely* when the jury only explicitly found facts supporting a deadly weapon enhancement?

2. If so, was the error invited?

3. If there was error and it was uninvited, can it be deemed harmless?

III. ANALYSIS

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. This court subsequently interpreted that decision to hold that statutory maximum meant the absolute maximum sentence provided by the legislature for an offense, not the maximum sentence allowed by the jury's findings. *State v. Gore*, 143 Wash.2d 288, 313-15, 21 P.3d 262 (2001) (citing *Apprendi*, 530 U.S. at 481, 120 S.Ct. 2348; *McMillan v. Pennsylvania*, 477 U.S. 79, 92, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)). The United States Supreme Court corrected our interpretation recently in *Blakely* by holding that the statutory maximum referenced in

Apprendi "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 124 S.Ct. at 2537 (citing *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). We considered *Blakely's* implications on our sentencing enhancement provisions for the first time in *State v. Hughes*. In *Hughes* we concluded that (1) *Blakely* did not invalidate our exceptional sentence provisions, (2) *Blakely* violations may never be deemed harmless, and (3) in the absence of legislative direction, cases reversed for *Blakely* violations will be remanded for resentencing based on only the original jury verdict. We apply that reasoning here and consider additionally whether Recuenco invited the asserted *Blakely* violation.

A. Did Imposition of the Firearm Enhancement Violate Recuenco's Sixth Amendment Jury Trial Right as Defined by *Blakely*?

[3] ¶ 10 The jury did not explicitly find beyond a reasonable doubt that Recuenco committed assault with a firearm; it found only the use of a deadly weapon. Without an explicit firearm finding by the jury, the court's imposition of a firearm sentence enhancement violated Recuenco's jury trial right as defined by *Apprendi* and *Blakely*—Recuenco's sentence was greater than that allowed solely based on the facts found by the jury.[2] The State concedes the existence of a *Blakely* Sixth Amendment violation, stating that its previous argument that the judge's imposition of the firearm enhancement was not subject to *Apprendi* was "no longer tenable" following *Blakely* and that Recuenco was "entitled" to a jury

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[2] Cases that allowed judges to impose firearm enhancements where juries found only the presence of deadly weapons are no longer good law in light of *Blakely*. *See, e.g., State v. Meggyesy*, 90 Wash.App. 693, 958 P.2d 319, *review denied*, 136 Wash.2d 1028, 972 P.2d 465 (1998); *State v. Rai*, 97 Wash.App. 307, 983 P.2d 712 (1999); *State v. Olney*, 97 Wash.App. 913, 987 P.2d 662 (1999).

finding that "he was armed with a firearm." Resp't's Supp. Br. at 7-8, 10-11. But the State argues the violation does not require vacation of his sentence because (1) Recuenco invited the error by proposing the special verdict form he now challenges and (2) the error was harmless.

B. Did Recuenco Invite the *Blakely* Error?

The Court of Appeals opinion stated in a footnote that it "appeared" that Recuenco had invited the error at issue because he had proposed the special verdict form the court used asking the jury only to find the existence of a deadly weapon, not specifically a firearm. *Recuenco*, 117 Wash.App. 1079, 2003 WL 21738927, at *5 n. 33 (citing *City of Seattle v. Patu*, 147 Wash.2d 717, 720, 58 P.3d 273 (2002) and stating that if "defendants propose erroneous instructions that do not include all elements of a crime, but do not attempt to add a remedial instruction, they invite the error and cannot complain on appeal."). The State adopts the Court of Appeals' reasoning in its argument asserting that Recuenco cannot now challenge the special verdict form because he proposed it.

The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally. *See Patu*, 147 Wash.2d at 720, 58 P.3d 273. The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the "to convict instruction." *Id.* (citing *State v. Studd*, 137 Wash.2d 533, 547, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wash.2d 867, 869, 792 P.2d 514 (1990)).

Both the Court of Appeals and the State misinterpret the alleged error here. Recuenco did not and does not assert that the *special verdict form* asking the jury to find the presence of a deadly weapon was error. Indeed, he proposed that instruction because he believed and continues to believe that it was the correct instruction for the charge of second degree assault

with a deadly weapon enhancement. Instead, Recuenco claims that the *judge's imposition of the firearm enhancement without the jury's finding the existence of a firearm* was an error violating his due process and jury trial rights. Moreover, he objected to that error at trial. The error asserted was not invited.

C. Can the Error be Deemed Harmless?

In *Hughes*, this court considered the applicability of harmless error analysis to *Blakely* Sixth Amendment violations and held that such violations can never be deemed harmless because to do so would be to speculate on the absence of jury findings. *See Hughes*, No. 74147-6, at 205- 208. Given this decision, we reverse the Court of Appeals and hold that the violation was not harmless.

IV. CONCLUSION

The imposition of a firearm enhancement that was not supported by the jury's special verdict violated Recuenco's Sixth Amendment jury trial right as defined by *Apprendi* and *Blakely*. That error was neither invited nor harmless.[3] We reverse the Court of Appeals and vacate Recuenco's sentence. Because we held in *Hughes* that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict. *See Hughes*, No. 74147-6, at 208-209.

WE CONCUR: ALEXANDER, C.J., C. JOHNSON, MADSEN, SANDERS, BRIDGE, CHAMBERS, OWENS, JJ., and IRELAND, J.P.T.

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[3] Given our decision, we do not address additional arguments Recuenco makes in support of vacation of his sentence.

APPENDIX B

COURT OF APPEALS OF WASHINGTON,
Division 1

No. 46208-3-I

STATE OF WASHINGTON,
Respondent,

v.

ARTURO R. RECUENCO,
Appellant.

July 28, 2003

Appeal from Superior Court of King County.

Washington Appellate Project, Attorney at Law, Gregory Charles Link, WA Appellate Project, Seattle, WA, for Appellant.

Prosecuting Atty King County, James Morrissey Whisman, King County Prosecutor/appellate Unit, David M. Seaver, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

GROSSE, J.

A jury instruction that relieves the State of its burden to prove each element of the crime charged constitutes a 'manifest' constitutional error and may be reviewed for the first time on appeal. Special verdict forms contained in jury instructions are also subject to constitutional constraints and must not exclude elements of the crime charged. However, even if we assume that the special verdict form here did not

include all the elements of the crime, it is clear that any error was harmless beyond a reasonable doubt. Affirmed.

FACTS

On September 18, 1999, police officers Lucas and Moore responded to a 911 call from the home of Arturo Recuenco. When Recuenco answered the door, the officers heard a woman within shout that Recuenco had a gun and was going to kill her. The woman, Recuenco's wife, approached the door crying and upset. Recuenco was charged with (1) second degree assault[1] with an allegation that he was armed with a handgun, a deadly weapon;[2] (2) interfering with a domestic violence report;[3] and (3) third degree malicious mischief.[4]

At trial, Recuenco's wife testified that on the day in question Recuenco had yelled at her for not preparing dinner for his sisters, smashed the glass stove top with a metal pipe, and then retrieved a gun from a filing cabinet and pointed it at her. She stated that she was very afraid when her husband pointed the gun at her as she thought he was going to shoot her. She testified that when she attempted to call 911, Recuenco ran to the phone cord and yanked it, ripping the jack from the wall. Officer Lucas testified that Recuenco's wife showed him where the gun was located. It was loaded and the officer took it into evidence.

Recuenco denied pointing the gun at his wife or threatening her. He stated that when his wife began to dial 911 he attempted to take the phone from her but unintentionally grabbed the cord and pulled the phone jack from the wall. Recuenco admitted that he damaged the stove because he was angry that his wife would not cook dinner. At the time of the

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[1] RCW 9A.36.021.

[2] Former RCW 9.94A.125 (1999), recodified as RCW 9.94A.602.

[3] RCW 9A.36.150.

[4] RCW 9A.48.090.

incident, the parties had been married for 15 years and had recently purchased the stove. Recuenco requested that the court instruct the jury on aiming a firearm and fourth degree assault as a lesser included or lesser degree offense of second degree assault. The court refused. The jury found Recuenco guilty of all charges. The jury also found by special verdict that he was armed with a deadly weapon when he committed the assault, but did not specifically find that he was armed with a firearm. The court imposed a three-year firearm enhancement on Recuenco's sentence for second degree assault.[5]

Recuenco appeals, claiming that the State failed to prove the malicious mischief charge and that the trial court erred in refusing the proposed jury instructions. Recuenco also argues that he was improperly found guilty of a general rather than the more specific offense of aiming a firearm, and the sentencing court violated his due process rights by imposing a firearm sentence enhancement where the jury entered a special verdict that he was armed with a deadly weapon, but not that he was armed with a firearm.

DISCUSSION

1. Malicious Mischief Charge.

Recuenco was charged with malicious mischief under RCW 9A.48.090. The State was required to prove beyond a reasonable doubt that Recuenco knowingly and maliciously caused physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree.[6]

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[5] Former RCW 9.94A.310(3) (1998), recodified as RCW 9.94A.510(3).

[6] In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); RCW 9A.48.090. Malicious mischief in the first degree requires damage exceeding $1,500.00 and malicious mischief in the second degree requires damage exceeding $250.00. RCW 9A.48.070; RCW 9A.48.080.

Recuenco argues that the State failed to prove each element of malicious mischief beyond a reasonable doubt because he was convicted based on damage to co-possessed community property. Recuenco argues that community property does not constitute 'property of another' as required by the malicious mischief statute.[7] However, the Supreme Court recently held otherwise.

In *State v. Coria*, a defendant who had argued with his wife and damaged items in their home was charged with malicious mischief.[8] The Supreme Court specifically held that community property is 'property of another' within the meaning of the malicious mischief statute, reversing the Court of Appeals and affirming the trial court's conviction.

Thus, since Recuenco admits that he damaged community property, we hold that the evidence was sufficient to show he damaged 'property of another.' Recuenco does not assert that the State failed to prove any of the other elements of the charge of malicious mischief in the third degree. Therefore, the conviction is affirmed.

2. Jury Instructions.

A. Lesser Included Offenses.

Recuenco asserts that the trial court erred in refusing to instruct the jury on the crime of aiming a firearm as a lesser included offense of second degree assault.[9] *State v. Workman* firmly establishes that a defendant in Washington is entitled to an instruction on a lesser included offense where (1) 'each of the elements of the lesser offense must be a necessary element of the offense charged' (legal prong), and (2) 'the

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[7] RCW 9A.48.090.

[8] *State v. Coria*, 146 Wn.2d 631, 48 P.3d 980 (2002).

[9] RCW 10.61.006 ('{T}he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.').

evidence in the case must support an inference that the lesser crime was committed' to the exclusion of the charged offense (factual prong).[10] The trial court here rejected Recuenco's proposed jury instruction on the grounds that the language of the aiming a firearm statute expressly precluded its use as a lesser included offense of assault. Although this was an improper analysis of the legal prong of Workman, the judgment of the trial court will not be reversed if it can be sustained on any legal theory, even if different from that indicated by the trial judge.[11] Recuenco asserts that the elements of the crime of aiming a firearm are necessary elements of the charged crime of assault by a deadly weapon. However, a defendant need not aim a firearm at a person to assault him or her. The defendant could merely display a firearm, but not aim it, and be found guilty of assault where the circumstances show a reasonable person would be afraid for his or her own bodily safety.[12] Thus, the crime of aiming a firearm is not a necessary element of the crime of second degree assault.[13] The legal prong of Workman is not met.

To show that the factual prong is met, "some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an

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[10] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Fernandez Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

[11] *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (citing *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985)).

[12] *State v. Karp*, 69 Wn.App. 369, 374-75, 848 P.2d 1304 (1993) (citing *State v. Murphy*, 7 Wn.App. 505, 511-12, 500 P.2d 1276 (1972)).

[13] *State v. Southerland*, 45 Wn.App. 885, 890, 728 P.2d 1079, rev'd on other grounds, 109 Wn.2d 389, 745 P.2d 33 (1987) (aiming a firearm is not a necessary element of second degree assault with a weapon); *State v. Bishop*, 6 Wn.App. 146, 152, 491 P.2d 1359 (1971) (to convict an accused of second degree assault, assaulting another with a weapon, does not necessarily require proof of aiming a firearm).

instruction will be given."[14] Further, although the evidence must be viewed in the light most favorable to the party requesting the instruction, the evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense.[15]

Recuenco argues that the factual prong of *Workman* is met because the jury could have found that he had no specific intent to cause reasonable apprehension of harm, but could have found that that he was guilty of aiming a firearm. However, neither the State nor Recuenco provided any evidence that he lacked the intent required of second degree assault; Recuenco simply denied pointing a gun at his wife. Thus, Recuenco's own theory of the case involved no aiming of a firearm. Because the evidence here did not affirmatively show that only a lesser crime was committed, we hold that the court did not err in refusing to give Recuenco's proposed lesser included offense instruction.

B. Lesser Degree Offense.

Recuenco argues that the trial court erred in refusing to instruct the jury on the crime of fourth degree assault as a lesser degree of second degree assault.[16] A defendant is entitled to a lesser degree offense instruction where (1) the statutes for both the charged offense and the proposed inferior

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[14] *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997) (quoting *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). *See also, State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (If the affirmative evidence presented 'would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given.').

[15] *Fernandez-Medina*, 141 Wn.2d at 455-56.

[16] RCW 10.61.003 (for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto).

degree offense 'proscribe but one offense;' (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.[17] The State concedes that the elements of fourth degree assault are necessarily included in the crime of second degree assault.[18] Thus, the only issue is whether there is affirmative evidence that the defendant committed only the inferior offense. The trial court properly found that there was not.

Recuenco asserts that the evidence of the struggle with his wife over control of the phone would support a conviction for fourth degree assault if the jury did not believe he was guilty of second degree assault. However, like a lesser included offense instruction, a lesser degree instruction is warranted where the evidence would permit a jury to find a defendant guilty only of the lesser offense, thereby acquitting him of the greater charge.[19] Recuenco cannot explain how a possible determination that he was guilty of fourth degree assault when he struggled to take the phone from his wife negates his guilt for second degree assault for the separate charged act of pointing a pistol at her. Thus, the evidence would not permit the jury to find Recuenco guilty of only the lesser offense. Because the offenses do not constitute lesser degrees of the same charged crime, we hold that the trial court did not err in refusing to give Recuenco's lesser degree offense instruction.

3. Aiming a Firearm as a Concurrent Offense to Second Degree Assault.

"{W}here a special statute punishes the same conduct which is punished under a general statute, the special statute

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[17] *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998).

[18] RCW 9A.36.041 defines fourth degree assault as an assault not amounting to first, second, or third degree assault.

[19] *Fernandez Medina*, 141 Wn.2d at 456; *Tamalini*, 134 Wn.2d at 732.

applies and the accused can be charged only under that statute."[20] Recuenco asserts that the crime of aiming a firearm is concurrent to the crime of second degree assault, as charged in this case, because it punishes the same conduct. He claims that because the State improperly charged him under a general statute when the more specific statute applied, he can only be convicted of the specific offense of aiming a firearm.

The determining factor in whether a special statute is concurrent with a general statute is that the general statute will be violated in each instance where the special statute is violated.[21] As discussed above, aiming a firearm does not produce an assault in each instance. An assault is an actual battery, an attempted battery, or an act done with the intent of creating apprehension or fear of imminent injury.[22] The crime of aiming a firearm involves only aiming a firearm at or towards any person.

Therefore, an individual can commit the crime of aiming a firearm even where circumstances indicate that no battery, attempted battery, or intent to create fear or apprehension occurred. Further, the crime of aiming a weapon punishes only the action of aiming the weapon, and specifically excludes actions that would comprise an assault.[23] Thus the statute defining the crime of aiming a firearm does not punish the same conduct described in the statute defining second degree assault. The two statutes are not concurrent. Thus, we hold that the State did not err in charging him with assault with a deadly weapon, rather than the crime of aiming a firearm, and

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[20] *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (quoting *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)).

[21] *Shriner*, 101 Wn.2d at 580. *See also*, 69 Wn.App. at 372.

[22] *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

[23] RCW 9.41.230(1)(a).

the jury did not err in convicting him of assault with a deadly weapon.

4. Firearm Enhancement.

The State's information charged Recuenco with being armed with a deadly weapon at the time of the assault, 'to-wit: a handgun, under the authority of {former} RCW 9.94A.125 and 9.94A.310.' Washington's Sentencing Reform Act of 1981 requires only that the jury find by special verdict that a deadly weapon was used, not whether the deadly weapon was a firearm.[24] The jury found that Recuenco was armed with a deadly weapon when he committed the assault. At sentencing, Recuenco argued the court could only impose a deadly weapon enhancement of one year, not a firearm enhancement, because the jury made no specific firearm finding.[25] The trial court found that the deadly weapon used was a firearm and imposed the mandatory three-year firearm enhancement.[26]

Recuenco argues that the United States Supreme Court recently held in *Ring v. Arizona* that some sentencing factors, like the firearm enhancement here, are actually elements of the crime and thus need to be pleaded and proven to the jury.[27] The State cites *Harris v. United States*, decided the same day as Ring, to support its argument that the firearm

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[24] Former 9.94A.125.

[25] Former RCW 9.94A.310(4)(b) provided that one year would be added to the sentence of a conviction for any class B felony where the offender was armed with a deadly weapon, except a firearm as defined in RCW. 9.41.010. Second degree assault is a class B felony. RCW 9A.36.021(2).

[26] Former RCW 9.94A.310(3)(b) provided that a firearm enhancement of three years would be added to the sentence of a conviction for any class B felony where the offender was armed with a firearm as defined in RCW 9.41.010.

[27] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

finding constitutes a sentencing factor, not an element of the crime, and thus need not be found by the jury.[28] Although Recuenco did not object to the alleged error at trial, omitting an element of the crime charged from jury instructions constitutes a 'manifest' constitutional error and may be reviewed for the first time on appeal.[29]

Nevertheless, even if we assume for purposes of argument that under *Apprendi v. New Jersey*,[30] as interpreted by *Harris* and *Ring*, the firearm finding is an element of the crime charged and thus should have been included on the jury's special verdict form, we find that any possible error was harmless beyond a reasonable doubt.[31]

In order to hold the error harmless, the appellate court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error."[32] The only weapon mentioned or charged in connection with the assault here was a firearm. The information specified that the deadly weapon Recuenco used in the assault was a handgun, a firearm. The prosecution argued to the jury that Recuenco committed the assault with a firearm. Jury instructions specified that a firearm constituted a deadly weapon. The jury then specifically found that Recuenco had committed the assault using a deadly weapon. No other weapon was mentioned. Any constitutional error was harmless because it is clear

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[28] *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

[29] *Eastmond*, 129 Wn.2d at 502; RAP 2.5(a); *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976); CrR 6.15(c).

[30] *Apprendi v. New Jersey*, 530 U.S. 466, 491, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *See also*, *McMillan v. Pennsylvania*, 477 U.S. 79, 81, 88, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

[31] *State v. Brown*, 147 Wn.2d 330, 339-41, 58 P.3d 889 (2002).

[32] *Brown*, 147 Wn.2d at 341 (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

beyond a reasonable doubt that the jury's verdict was not affected by the error.[33]

The decision of the trial court is affirmed.

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[33] It also appears that Recuenco invited the error because he proposed the special verdict form given by the court which specified that the jury only needed to make a deadly weapon finding, not a finding about the type of weapon used. Defense counsel stated during discussion of the instructions, '{T}he special verdict form is the same as what I have proposed, so there is no objection to that.' 8 Report of Proceedings at 802-03. Where defendants propose erroneous instructions that do not include all elements of a crime, but do not attempt to add a remedial instruction, they invite the error and cannot complain on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (citing *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)).

APPENDIX C

SUPREME COURT OF WASHINGTON,

En Banc

Nos. 74147-6, 75053-0, 75063-7

STATE OF WASHINGTON,

Respondent,

v.

DANIEL D. HUGHES,

Petitioner.

STATE OF WASHINGTON,

Respondent,

v.

GEORGE LEONARD SELVIDGE,

Petitioner.

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY ANDERSON,

Petitioner.

Argued Nov. 9, 2004
Decided April 14, 2005

Sentences reversed and cases remanded, and conviction of third defendant affirmed.

Sanders, J., filed concurring opinion.

FAIRHURST, J.

[Excerpt]

C. *Can Harmless Error Analysis Apply to Blakely Violations?*

Not all federal constitutional errors require reversal, some may have been harmless in their effect on the trial. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Some constitutional errors, however, "will always invalidate the conviction" and are considered "structural" errors. *Id.* at 279, 113 S.Ct. 2078. Such violations that have been deemed *never* to be harmless include a deficient reasonable doubt instruction, deprivation of the right to counsel, a biased trial judge, and violation of the right to self-representation. *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

This court addressed the question of whether violation of the Sixth Amendment right to have a jury find facts that increase the penalty for a crime beyond the absolute statutory maximum can be deemed harmless error in *State v. Thomas*, 150 Wash.2d 821, 849-50, 83 P.3d 970 (2004). There, we analyzed several errors regarding jury instructions and held that violations of the Sixth Amendment right to have a jury find aggravating circumstances cannot be harmless. *Id.* Following the Supreme Court's decision in *Blakely*, we still hold that harmless error analysis is inappropriate but take this opportunity to clarify our reasoning.

The Supreme Court's reasoning in *Sullivan* articulates the absurdity of applying harmless error analysis to *Blakely* Sixth Amendment violations. *See Sullivan*, 508 U.S. 275, 113 S.Ct. 2078. There, the Supreme Court held that a constitutionally deficient reasonable doubt instruction could never be harm-

less, equating it to lack of a jury verdict of guilty beyond a reasonable doubt. *See Sullivan*, 508 U.S. at 279-80, 113 S.Ct. 2078. The Court reasoned that the traditional harmless error analysis defined by *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), requiring a showing beyond a reasonable doubt that the error at issue did not contribute to the verdict received, could not be applied where there was no verdict of guilty beyond a reasonable doubt:

> Consistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand . . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, *because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.*
>
> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found*

> petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Sullivan, 508 U.S. at 279-80, 113 S.Ct. 2078 (some emphasis added) (citations omitted).

The Court reasoned that because there was not a proper reasonable doubt instruction, there had not been a jury verdict of guilty beyond a reasonable doubt. Thus, there was nothing upon which to apply the harmless error analysis to conclude that, but for the error, the result would have been the same. To the contrary, the court would only have been speculating on how the jury *would have found* if they had been correctly instructed.

This is directly analogous to the situation presented by judges, rather than juries, finding facts necessary to increase sentences. In each case at hand, there was no jury finding beyond a reasonable doubt of aggravating factors warranting an enhanced sentence. It would be illogical to perform harmless error analysis on the absence of those findings. There is no object upon which to apply harmless error analysis. Instead of asking whether but for the error the findings *would have been the same*, the court would be asking whether but for the error the findings *would have been different*. Such an analysis is the equivalent of speculating on the jury's verdict, which the Supreme Court has held is never allowed.[1]

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[1] The Washington Court of Appeals applied the Court's reasoning in *Sullivan* in a similar way in *State v. Jackson*, 87 Wash.App. 801, 944 P.2d 403 (1997), *aff'd*, 137 Wash.2d 712, 976 P.2d 1229 (1999). The court there analyzed whether a jury instruction without the proper standard for

Supporters of harmless error analysis, argue that the Supreme Court and other federal courts have already held that harmless error analysis applies to *Apprendi/Blakely* Sixth Amendment violations. Those proponents, however, incorrectly characterize *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Instead of holding that harmless error analysis applied to *Apprendi* violations, the Supreme Court in *Cotton* actually applied the plain error doctrine.[2] It held that plain error analysis could be applied to *Apprendi* violations and concluded that the error at issue did not affect the "fairness, integrity, or public reputation" of the proceedings. *Id.* at 631-32., 122 S.Ct. 1781.

The Ninth Circuit subsequently addressed whether harmless error could be applied to *Apprendi* violations and held that the Supreme Court's analysis in *Cotton* regarding plain

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finding guilt as an accomplice could be deemed harmless. *Id.* at 814-16, 944 P.2d 403. The court reasoned that in applying harmless error analysis, the reviewing court asks whether the guilty verdict was "unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical jury faced with the same record, except for the error." *Id.* at 813, 944 P.2d 403 (citing *Smith*, 131 Wash.2d at 266, 930 P.2d 917). It went on to discuss *Sullivan* and concluded that "[h]armless error analysis is incompatible with the absence of an actual verdict beyond a reasonable doubt." *Id.* at 814, 944 P.2d 403 (citing *Carella v. California*, 491 U.S. 263, 269, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (Scalia, J., concurring)). Thus, "[l]acking a formal verdict, the appellate court would be infringing the right to a jury trial by holding that no reasonable jury would have found otherwise." *Id.* (citing *California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 339, 136 L.Ed.2d 266 (1996) (Scalia, J., concurring)).

[2] Plain error analysis considers the situation where a party raises an issue for the first time on appeal and requires that party to show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Cotton*, 535 U.S. at 631, 122 S.Ct. 1781 (quoting *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). Following that showing, the party must also prove that "'(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *Johnson*, 520 U.S. at 467, 117 S.Ct. 1544).

error did not control its decision: "*United States v. Cotton* . . . does not control nor aid our analysis. The lack of drug quantity in the indictment and jury decision in that case was analyzed under plain error, not harmless error." *United States v. Jordan*, 291 F.3d 1091, 1096 n. 7 (9th Cir.2002).

The Ninth Circuit went on to find that harmless error is *not* appropriate where the exceptional sentence is *greater* than that allowed for the offense charged and found by the jury. *Id.* at 1096-97. Like the Supreme Court in *Sullivan*, the Ninth Circuit found that harmless error analysis in such a situation would require too much speculation "[w]hen quantity [the basis for the exceptional sentence] is neither alleged in the indictment nor proved to a jury beyond a reasonable doubt, there are too many unknowns to be able to say with any confidence, let alone beyond reasonable doubt, that the error was harmless." *Id.* at 1096. Additionally, the court was troubled that consideration of the defense's likely response to the aggravating evidence was also speculative. *See id.* at 1096-97. The court concluded that *whenever* a fact that increases the maximum sentence is not decided by the jury, "the error must be corrected." *Id.* at 1097.

Harmless error proponents also assert that other persuasive authorities have applied such analysis to *Apprendi/Blakely* violations.[3] Indeed, *some* federal jurisdictions have applied harmless error analysis. *See, e.g., Campbell v. United States*, 364 F.3d 727, 737 (6th Cir.2004) (reasoning that *Apprendi*

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[3] Respondent Lewis County Prosecutor cites two Ninth Circuit cases as applying harmless error analysis to *Apprendi* violations. *See* Resp't Br. at 12 n.41. Respondent misrepresents those cases; they actually apply plain error analysis, which is distinct. They do not address the applicability of harmless error. *See, e.g., United States v. Valensia*, 299 F.3d 1068, 1076-77 (9th Cir.2002). Respondent also discusses several Washington cases with similar facts to support application of harmless error analysis here. Resp't Br. at 12-13. Those cases, however, were decided *before Blakely* and the evolution of the constitutional right at issue here.

errors are "trial-type" errors subject to harmless error analysis and holding that the reviewing court must determine beyond a reasonable doubt whether the jury would have found the fact at issue in sentencing). The Fifth Circuit also applied harmless error analysis and provided more reasoning for doing so. *See United States v. Matthews*, 312 F.3d 652 (5th Cir.2002). There, the Fifth Circuit reasoned that an *Apprendi* violation really contains a defective indictment and a defective jury instruction, neither of which are in the limited class of structural constitutional errors that can never be deemed harmless. *Id.* at 665. It also noted that the Supreme Court applied harmless error analysis to the omission of offense elements from a jury instruction. But it did not discuss the implicit difference between asking whether but for the error, the jury would have rendered the *same* or *different* verdict.

The authority asserted by harmless error proponents is unpersuasive. The federal jurisdictions appear inconsistent in whether they will apply harmless error analysis to *Apprendi*/*Blakely* violations. Moreover, the Supreme Court has not yet ruled to clarify this issue.[4]

The proponents of harmless error analysis also seek to analogize *Blakely* Sixth Amendment violations to omission of offense elements from jury instructions, which the Supreme Court has held is subject to harmless error analysis.[5] *See*

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[4] In *Booker*, the Supreme Court's most recent opinion regarding the constitutionality of sentencing schemes with judicial fact-finding, the Court did not rule on the applicability of harmless error analysis. However, if anything, the majority opinion written by Justice Breyer implied that harmless error analysis would not be applicable to such Sixth Amendment violations: "[I]n cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine." *Booker*, 125 S.Ct. at 769.

[5] This court adopted the United States Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), in *State v. Brown*, 147 Wash.2d 330, 340, 58 P.3d 889 (2002). We further

Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The Court there held that conclusion was consistent with *Sullivan*, distinguishing the situation where *all* of the jury's findings were "vitiated" by the improper reasonable doubt instruction from that where the jury simply did not explicitly find on *one* element. *Id.* at 10-15, 119 S.Ct. 1827.

The situation arising in *Blakely* Sixth Amendment violations is readily distinguishable from the scenario in *Neder*. Although *Neder* involved the situation where a jury did not find facts supporting every element of the crime, it still returned a guilty verdict. Like traditional harmless error analysis cases, the reviewing court could ask whether but for the omission in the jury instruction, the jury would have returned the *same* verdict. Where *Blakely* violations are at issue, however, the jury necessarily did *not* return a special verdict or explicit findings on the aggravating factors supporting the exceptional sentence. The reviewing court asks whether but for the error, the jury would have made *different* or *new* findings. This situation is analogous to *Sullivan*—there is no basis upon which to conduct a harmless error analysis. Instead, proponents of harmless error ask this court to speculate on what juries would have done if they had been asked to find different facts. This speculation is not permitted. Harmless error analysis cannot be conducted on *Blakely* Sixth Amendment violations.

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explained in *Thomas* that not every omission or misstatement of an element in a jury instruction relieves the State of its burden: "'the error is harmless if that element is supported by uncontroverted evidence.'" *Thomas*, 150 Wash.2d at 844-45, 83 P.3d 970 (quoting *Brown*, 147 Wash.2d at 341, 58 P.3d 889). And in that very same opinion, we held that harmless error analysis *could not* apply to *Apprendi* violations. *Id.* at 847, 849. That case presented *both* types of errors and we chose *not* to apply the *Neder* reasoning to *Apprendi* errors.

No. 05-83

THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In Sullivan v. Louisiana, 508 U.S. 275 (1993) this Court concluded the denial of a jury verdict based on proof beyond a reasonable doubt is structural error which always requires the conviction be reversed. The Washington Supreme Court concluded the trial court's entry of a conviction of a greater crime than that found by the jury is not the product of a jury verdict based on proof beyond a reasonable doubt and thus pursuant to Sullivan concluded the error automatically required reversal. Should this court grant the State of Washington's petition for writ of certiorari?

2. Factual findings which increase the statutory maximum penalty are elements of enhanced or greater offenses. The Double Jeopardy provisions of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, bar the entry of a judgment notwithstanding the verdict in favor of the government in a criminal case. Does the Double Jeopardy clause also bar a reviewing court from concluding an error in entering a judgment on a greater offense then reflected in the jury verdict alone is harmless?

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Arturo Recuenco respectfully requests this Court deny the State of Washington's petition for a writ of certiorari to review the opinion of the Washington Supreme Court.

JURISDICTION

The Washington Supreme Court entered its decision on April 14, 2005. State v. Recuenco, 154 Wn.2d 156 (2005). The petition was filed on July 14, 2005. The jurisdiction of the Court was invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The State of Washington's petition for writ of certiorari properly notes that this case implicates the Fifth and Fourteenth Amendments to the United States Supreme Court. However, the State of Washington's petition in its statement of Constitutional Provisions Involved fails to note that the Sixth Amendment is involved as well.

STATEMENT OF THE CASE

Wash. Rev. Code §9.94A.533(4)[1] sets forth the length of additional confinement to which a trial court must impose where there has been an allegation and special jury finding that a defendant was armed with a deadly weapon in the commission of a crime. Wash. Rev. Code §9.94A.602, requires a special allegation that a person is armed with a deadly weapon, and a jury finding of that fact. That statute also defines a deadly weapon to include any firearm. Wash Rev Code §9.94A.602. With respect to the crime of second degree assault, a Class B felony, Wash. Rev. Code §9.94A.533(4)(b) provides for a mandatory additional term of 12 months confinement if the jury returns a deadly weapon special verdict.

[1] The statutes at issue have been recodified since the time of Mr. Recuenco's offense. For ease of reference, and because the recodified statutes did not effect any substantive changes, Mr. Recuenco will cite to the current statutes.

Wash Rev. Code §9.94A.533(3) provides for the imposition of a greater term of confinement where the jury finds the defendant committed the offense with a firearm. A firearm finding for Class B felony requires the imposition of an additional 36 months confinement.

In its petition, the State of Washington erroneously cites to Wash. Rev. Code §9.94A.510 instead of Wash. Rev. Code §9.94A.533. See e.g. Petition at 2.

The charging document in this case charged Mr. Recuenco with second degree assault with the additional allegation he was armed with a deadly weapon. Recuenco, 154 Wn.2d at 158. The jury returned a special verdict finding Mr. Recuenco was armed with a deadly weapon during the commission of the second degree assault. Id. The jury was not asked and did not return a special verdict concluding Mr. Recuenco was armed with a firearm. Id. at 160.

In its statement of the case the State incorrectly asserts "[t]here was no evidence of any other weapon in the assault." Petition at 2. However, the evidence established that during the course of the incident Mr. Recuenco wielded a metal pipe. Petition at 10a. Pursuant to Wash. Rev Code § 9.94A.602, "any metal pipe or bar used or intended to be used as a club" is a deadly weapon.

At sentencing, Mr. Recuenco argued the court could only impose the additional time permitted by the jury's deadly weapon. Recuenco, 154 Wn.2d at 160. Concluding that the evidence established Mr. Recuenco was armed with a firearm, the trial court concluded it had no discretion but to impose an additional 36 month firearm enhancement instead of the 12 months permitted by deadly weapon allegation and jury finding. Id.

Mr. Recuenco appealed the judgment in his case relying on this Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) to argue his Sixth and Fourteenth Amendment rights to a jury finding beyond a reasonable doubt of each element of the offnese were violated where the trial court imposed an additional term based upon its rather than the jury's finding that Mr. Recuenco was armed with a firearm. After, the Washington Court of Appeals affirmed the judgment, and while Mr. Recuenco's petition for review was pending in the Washington Supreme Court, this Court issued its decision in Blakely v. Washington, 542 U.S. 296 (2005).

After the Washington Supreme Court accepted review, the State of Washington conceded the trial court's finding was contrary to Blakely and Apprendi and violated Mr. Recuenco's right to jury finding beyond a reasonable doubt. Recuenco, 154 Wn.2d at 162-63. The State argued, however, that any error was harmless contending the evidence plainly established Mr. Recuenco was armed with a handgun.

Mr. Recuenco argued first that because under Blakely the determination that a person was armed with either a deadly weapon or a firearm elevates the punishment to which he or she is exposed, each finding is an element of an aggravated version of the substantive offense they arise from. Mr. Recuenco argued there is a continuum of three relevant degrees or levels of offenses: second degree assault; second degree assault with a deadly weapon finding; and second degree assault with a firearm finding. Mr. Recuenco contends that any judicial finding which increases the crime of conviction along that continuum, beyond that permitted by the jury verdict, not only violates the Sixth and Fourteenth Amendments, it also violates the Fifth Amendment's Double

Jeopardy Clause, as it constitutes a judgment notwithstanding the verdict. Mr. Recuenco also argued that because such a finding was not made by jury beyond a reasonable doubt, Sullivan did not permit a reviewing court to find that the error was harmless. In addition, Mr. Recuenco argued an independent analysis of the jury trial guarantees of the Washington Constitution precluded application of a harmless error analysis.

The Washington Supreme Court concluded that harmless error analysis could not apply because to do so would be to speculate on the absence of jury findings. Recuenco, 154 Wn.2d at 164) (citing, State v. Hughes, 154 Wn.2d 118, 144-45 (2005) (finding Sullivan analogous to situation presented where judicial as opposed to jury findings are used to increase a defendant's sentence based on less than proof beyond a reasonable doubt). Moreover, the Washington Supreme Court in both Hughes and Recuenco concluded that because there was no statutory mechanism in place to permit the imposition of the aggravated sentences, and because the court was not free to graft such a mechanism onto the statute, the only option left to the court was to remand the matters for sentences consistent with the jury's verdict. See, Recuenco, 154 Wn.2d at 164 (citing Hughes, 154 Wn.2d at 151-52).

Because it rested its decision on its analysis in Hughes, the Washington Supreme Court did not address Mr. Recuenco's additional argument that Double Jeopardy also barred application of a harmless error analysis. Recuenco, 110 P.3d at 192 n.3. Nor did the court address Mr. Recuenco's argument that application of the jury trial guarantees of the Washington Constitution precluded application of a harmless error analysis.

Mr. Recuenco has completed his term of confinement in this matter including that required by the judicially made firearm finding.

REASONS FOR DENYING THE PETITION

A. This case does not present any federal question upon which courts are divided.

1. This case does not present the question of whether a *Apprendi* error can be harmless because the trial court erred even more fundamentally by entering a judgment notwithstanding the verdict.

While Washington law provides for an additional term for a deadly weapon finding and a longer term based upon a firearm, Wash. Rev Code §9.94A.602 provides that a firearm is a deadly weapon for purposes of the deadly weapon enhancement. Moreover, the jury was expressly instructed this was so. Because a firearm supports both a deadly weapon finding and firearm finding, the deadly weapon finding is in effect a lesser included finding of a firearm finding.

The jury instructions set forth each element of the offense the State of Washington alleged Mr. Recuenco had committed – second-degree assault with a deadly weapon. The verdict the jury returned was complete with respect to every element of the offense charged and was based upon the proper standard of proof. Certainly the state could have asked the jury to return a more serious finding that Mr. Recuenco was armed with a firearm as opposed to merely a deadly weapon, but the state did not. The state elected to pursue the lesser finding and was successful in that endeavor.

But despite this complete verdict, the trial court concluded that a greater finding was necessary. There is no statutory provision legislative directive that required the

court to do so, rather this procedure is solely the product of caselaw. See Recuenco, 154 Wn.2d at 162 n.2. In doing so the court necessarily is making its own determination as to proper verdict encroaching upon the province of the jury by placing its judgment ahead of the jury's.

Cases like Blakely and Apprendi, by contrast, do not involve the same judicial disregard of the jury's verdict. Instead, in Apprendi, for example, a jury was not asked to make any finding as to the motivation for the crime much less whether it was racially motivated, nor did Mr. Apprendi make a stipulation as to motivation in his guilty plea. In making, the racial motivation finding the trial court, while going beyond that permitted by the either jury verdict or guilty, was not in any way suggesting the insufficiency of a jury's verdict returned or placing its judgment ahead of the jury's. And in both Apprendi and Blakely, the findings were statutorily authorized, as opposed to the sort of judicially driven encroachment present here.

By setting aside the jury's verdict in this case, a scenario not present in either Blakely or Apprendi, the trial court case engaged in distinctly different and fundamentally more problematic practice than in those two cases. Thus, this case does not properly present the question of whether Apprendi error in a simpler form may be deemed harmless.

2. Even if this case presented the question of whether *Apprendi* error can be harmless, there is no federal conflict on that issue because the two state courts which have deemed *Apprendi* errors structural did so substantially for law reasons.

The State of Washington claims the decision in Recuenco and Hughes, as well as the decision of the North Carolina Supreme Court in State v. Allen, _ S.E..2d

(N.C.) (2005 Lexis 695) holding harmless error analysis cannot apply are in conflict with decisions of several other state courts. Petition at 13-16. But this "conflict" is as much if not more about differences in state sentencing law than about a conflict in interpreting this Court's precedent.

Recuenco concluded the error

> was neither harmless nor invited. We reverse the Court of Appeals and vacate Recuenco's sentence. Because we held in Hughes that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury special verdict.

Recuenco, 154 Wn.2d at 164 (footnote omitted) (citing Hughes, 154 Wn.2d 118). In Hughes the court concluded there was no statutory sentencing scheme in place which permitted the submission of a aggravating factors to a jury. 154 Wn.2d at 149. Moreover, the Court concluded the creation of such a procedure was for the legislature and not the courts. Id. Thus, because no statute permitted a jury to have made the findings necessary to support the aggravating factors in that case, the Hughes court concluded it could not do so.

The North Carolina Supreme Court reached the same conclusion in Allen, stating "[a]lthough this Court might envision measures which could cure the constitutional defect in [the relevant statute] we are in agreement that the choice of remedy is properly within the province of the General Assembly." 2005 Lexis 695, 50-51.

Each of these decisions rests in large measure on the conclusion of state courts that correction of the relevant statutory schemes lies with the legislative branches in those states as opposed to the judiciary. The resolution of the highest courts of these states of the proper balance of authority among the branches of government in their

states does not create a conflict with courts of other states which have not employed such restraint.

B. The question presented implicates an extremely small, and ever dwindling, number of cases.

The State of Washington argues it is necessary for this Court to resolve the question of the applicability of harmless error to Apprendi error as the issue has far-ranging impact. Petitioner greatly exaggerates the impact any decision would have in either federal courts or in the various states.

In United States v. Booker, this Court substantially limited the number of cases which present a Blakely argument on direct appeal. 125 S. Ct. 738 (2005). Booker necessarily has substantially limited the number of cases which will ever address the question of harmless error on direct appeal in federal court. The question presented in this case will almost never come up with respect to the federal sentencing guidelines because almost no defendants raised Apprendi challenges before Booker, and Booker requires unpreserved claims be reviewed under the plain error doctrine.

In the State of Washington itself, new legislation was enacted effective April 18, 2005, providing procedures for alleging and proving to a jury facts which a trial court may rely upon to impose an aggravated sentence. App. A1-10 (ch. 68 Laws 2005 §§1-7 amending Wash. Rev. Code §9.94A.530 and Wash. Rev. Code §9.94A.535, and adding new section to Wash Rev. Code ch.9.94A). Pursuant to this act, all aggravated sentences for offenses committed after April 18, 2005 will be based upon facts proved to a beyond a reasonable doubt to a jury. Further, the Washington Supreme Court has ruled Blakely is not retroactive to cases which were final prior Blakely. State v. Evans,

Wn.2d _ (2005 Lexis 541). Even in Washington, at best any decision by this Court will apply only to that small class of cases which arose after Blakely was decided in June 2004, but before enactment of the new legislation. But even that small class may shrink to the point of disappearing, as the State of Washington has begun arguing the new legislation applies even in the case of offenses committed prior to its enactment. If this is the case, any decision by this Court in this matter will effect no one in Washington other than Mr. Recuenco, and because Mr. Recuenco has completed his sentence in this matter even its impact on his case will be minimal.

What has occurred in Washington can reasonably be expected to occur in other states as well, as legislature's correct the varied sentencing statutes to reflect this Court's decision in Blakely, cases requiring a determination of whether an error was a harmless will steadily disappear. See Allen, 2005 Lexis 695, 50-51 (concluding that question of how to correct sentencing procedure which violated Blakely is a matter for the North Carolina General Assembly).

> Unless, the State of Washington is contending that the issue in this case is important because it and other prosecutorial authorities intend to continue to seek the imposition of sentences which violate Apprendi and Blakely, the importance of the issues presented here will be short lived. At best the State of Washington's argument is nothing more than an effort to correct what it perceives to be an erroneous ruling by the Washington Supreme Court, which stands in the way of the State's effort to save a finite and ever decreasing group of wrongful judgments. There is no reason to grant a writ of certiorari in such a case.

C. The Washington Supreme Court's decision on the facts of this case is correct.

1. The State's argument is premised on the incorrect assertion that neither the deadly weapon nor firearm findings are elements of an offense.

As it did in Blakely, the State of Washington maintains that facts which increase the maximum sentence to which a defendant is exposed are not in fact elements of a greater crime. Petition at 9-10. The State of Washington claims "The weapon enhancement is a sentencing factor, not an element of the crime." Id. Such a contention is contrary to this Court's decisions.

The judicial determination of factors which increase a defendant's sentence implicate the Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt because such facts are elements of a greater offense. Apprendi, 530 U.S. at 490; Ring, 536 U.S. at 604, 609. The Court has gone further to explain that the facts at issue must be treated in every respect as elements of the offense. In Apprendi, the Court distinguished the term "element" from the term "sentencing factor" noting that the former refers to facts which increase the maximum penalty for an offense while the later refers to facts which set the penalty with the existing range. Apprendi, 530 U.S. at 494. The Court further explained this saying

> Apprendi and [McMillan v. Pennsylvania, 477 U.S. 79 (1986)], mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are **the elements** of the crime for purposes of the constitutional analysis.

Harris v. United States. 536 U.S. 545, 557-58 (2003) (Emphasis added); See also, Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as the functional equivalent of an element of a greater

offense"), Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (plurality decision)("we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes and 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause"). Thus it is plain that the facts used to impose a greater sentence then permitted by the jury's verdict in Mr. Recuenco's case are elements, and must be analyzed as such.

Further, the State wrongly claims the error here was merely in "misdefining a sentence enhancement." The Washington Supreme Court flatly rejected the State's effort to redefine the claimed error when it rejected the State's argument that Mr. Recuenco invited the error. The Washington Supreme Court said:

> Both the Court of Appeals and the State misinterpret the alleged error here. Recuenco did not and does not assert that the special verdict form asking the jury to find the presence of a deadly weapon was error. Indeed, he proposed that instruction because he believed and continues to believe that it was the correct instruction for the charge of second degree assault with a deadly weapon enhancement. Instead, Recuenco claims that the judge's imposition of the firearm enhancement without the jury's finding the existence of a firearm was an error violating his due process and jury trial rights.

Recuenco, 154 Wn.2d at 163-64. Nonetheless the State of Washington persists in its effort to recast the issue in this case.

Because a firearm supports both a deadly weapon finding and firearm finding, the deadly weapon finding is in effect a lesser included finding of a firearm finding. Thus, the error was not merely in misdefining a "sentencing factor." Rather, the error was in the trial court ignoring the jury's verdict to make a finding of a greater element finding based upon an undisclosed standard of proof. It is this misunderstanding of

Apprendi and this recasting of the claimed error upon which the State of Washington bases its argument.

2. The Decision of the Washington Supreme Court is consistent with this Court's decision in *Sullivan* and *Neder*.

The State of Washington maintains the decision of the Washington Supreme Court in this case and its Hughes decision are contrary to this Court's decision in Neder v. United States, 527 U.S. 1 (1999). Petition at 7-10. But no conflict exists, and the decision is wholly consistent with both Neder and Sullivan.

Neder concerned only the question of whether harmless error could apply where the jury was not charged on an element of an offense, and the judge instead found the element beyond a reasonable doubt. See Neder, 527 U.S. at 9 (noting that while trial judge removed element from jury, trial judge employed the correct standard of proof to find the element). Sullivan by contrast involved a situation where the jury returned a verdict on each element but did so without having been instructed on the proper standard of proof. Neder made clear it was not overruling Sullivan and expressly noted its holding was "consistent with the holding (if not the entire reasoning of [Sullivan]." Neder, 527 U.S. at 10.

It is only by recasting the error in this case as merely a misdefinition of an element that the State of Washington can claim that Neder is implicated. See Petition at 8-9. But, as the Washington Supreme Court recognized that is not the case. Recuenco, 154 Wn.2d at 163-64. Unlike Neder the court did not remove a single element from the jury's consideration. Instead, what the court did was to go beyond the jury's complete verdict to enter judgment against Mr. Recuenco on a greater offense.

The State of Washington's claim is akin to claiming that where a person is charged with assault and the jury fully instructed on the charge of assault but the trial judge enters a conviction of murder, the error merely lies in the failure to instruct the jury on the elements of murder. Neder plainly does not reach such a scenario.

If, as the State of Washington contends, Sullivan does not apply where a judicial finding of an element is made on less than proof beyond a reasonable doubt, the State offers no explanation of when Sullivan might apply. Because the error in this case and Hughes not only involved the denial of a jury determination but also denial of the right to have that finding made on proof beyond a reasonable doubt Neder has no application.

3. Although it did not reach the question, the Washington Supreme Court's rejection of harmless error analysis is consistent with and dictated by this Court's Double Jeopardy jurisprudence.

As explained above, because a finding which increases the maximum punishment of an offense is an element, for purposes of this case there is a continuum of three relevant degrees or level of offenses: second degree assault; second degree assault with a deadly weapon finding; and second degree assault with a firearm finding.

The Fifth Amendment provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Fifth Amendment's double jeopardy protection is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787 (1969).

Where a defendant is sentenced based on the jury's verdict plus a fact found by a judge, the defendant has been convicted of an aggravated version of the crime actually reflected in the jury's verdict. See e.g., Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as

the functional equivalent of an element of a greater offense"), see also Sattazahn, 537 U.S. at 111 (Plurality decision).[2] Justice Scalia's plurality decision went beyond merely restating the Ring holding: "we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes and 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause." Sattazahn, 537 U.S. at 111.

Double jeopardy principles do not permit the state to seek a judgment not withstanding the verdict no matter how clear or strong the evidence of guilt. Standefer v. United States, 447 U.S. 10, 21-25 (1980). In addition, the double jeopardy principles bar any effort to uphold the greater conviction on appeal, or to permit the State to seek a verdict on the greater offense on remand. "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." Green v. United States, 355 U.S. 184, 193-94 (1957). Put simply, where jeopardy has attached to one offense by means of a conviction or acquittal, an appeal of another offense as violating double jeopardy does not allow removing the jeopardy bar which attached to the first. Benton illustrates this point.

In Benton a defendant was acquitted of larceny but convicted of burglary. 395 U.S. at 785. Because both the grand and petit juries had been selected under an

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[2] This portion of Sattazahn was only joined in by four justices, as Justice O'Connor, consistent with her dissent in Apprendi and Ring, refused to join in this section of the opinion. See 537 U.S. at 117 (O'Connor, J., concurring in part and concurring in the judgment). It is nonetheless undoubtedly an accurate statement of the law in light of Apprendi and Ring, as the four-justice dissent in Sattazahn, although disagreeing with the majority's refusal to find a jury's inability to reach a unanimous verdict on whether to impose the death penalty was the equivalent of an acquittal, specifically relied on Ring for the point that aggravating factors in death penalty cases are the equivalent of elements. Sattazahn, 537 U.S. at 126 n.6 (Ginsburg, J., dissenting).

invalid procedure, a state court set aside his burglary conviction. Id. at 786. On remand the State again sought and obtained a conviction of both burglary and the larceny of which the defendant was acquitted. Id. Before this Court, the Maryland argued that because the larceny indictment was void due to a procedural defect, no jeopardy attached and thus he could be tried again for both. Id. at 796. The Court rejected this claim finding that even if the indictment was void

> [p]etitioner was acquitted of larceny. He has, under Green a valid double jeopardy plea which he cannot be forced to waive. Yet Maryland wants the earlier acquittal set aside, over petitioner's objections, because of a defect. This it cannot do.

Benton, 395 U.S. at 797; see also United States v. Ball, 163 U.S. 662, 669-70 (1896) (concluding that even though acquittal stemmed from fatally defective indictment, the indictment was not void but merely voidable and government could not seek to set aside acquittal over defendant's objection). Because of state law questions of the interrelation of the larceny and burglary convictions, Benton remanded the matter to the state court to determine whether the burglary conviction was also barred by the jeopardy which attached to the larceny conviction. 395 U.S. at 798-99.[3]

Here a jury convicted Mr. Recuenco of second degree assault with a deadly weapon enhancement. That conviction is final, as the Washington Court of Appeals and the Washington Supreme Court have rejected all challenges to it. That final conviction now bars any conviction for a greater or lesser offense. United States v. Dixon, 509 U.S. 688, 698 (1993). Dixon explained that where a first offense results in a

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[3] Assuming that under Maryland law larceny was a lesser offense of burglary, the Court's subsequent decisions in cases dealing with lesser offenses, would require the conclusion that the burglary conviction was also barred.

conviction, and proof of a second offense necessarily proves the first, the conviction on the first will bar prosecution on the second. In Dixon, the Court found that pursuant to the Blockburger[4] test, a defendant could not be convicted of both contempt, for violating conditions of release by possessing drugs, and of the substantive offense of possession of drugs even though the defendant could commit contempt without possessing drugs, as the possessio harge was "a species of lesser-included offense." 509 U.S. at 98, citing, Illinois v. Vitale, 447 U.S. 410, 420-421 (1980) (Double Jeopardy Clause would be violated if the state's proof of manslaughter required proof of the misdemeanor crime of failure to slow to avoid accident of which the defendant has already been convicted); and Whalen v. United States, 445 U.S. 684, 694 (1980) (convictions of both rape and felony murder based on rape violated double jeopardy).

A "firearm" is by definition in Washington law a deadly weapon. Wash. Rev. Code §9.94A.602. Thus, proof sufficient to support a firearm special verdict necessarily establishes the lesser deadly weapon finding, and second degree assault with a deadly weapon finding is a "a species of lesser-included offense" of second degree assault with a firearm. Dixon, 509 U.S. at 698. Therefore, the jury's verdict on the lesser will bar any effort to seek a verdict or conviction on the greater. Id.

Because Mr. Recuenco's appeal of the conviction of the greater offense of second degree assault with a firearm does not waive his claim of former jeopardy which arises from his final conviction of second degree assault with a deadly weapon, no further action can be taken to seek or affirm the conviction of second degree assault with a firearm. See Green, 355 U.S. at 193-94; and Benton, 395 U.S. at 797. This

[4] Blockburger v. United States, 284 U.S. 299 (1932).

necessarily includes any effort to apply a harmless error analysis to affirm the conviction on appeal or any effort by the State on remand to seek a verdict on second degree assault.

Any argument that double jeopardy principles have no application here as this matter merely involves the sentence imposed miscomprehends Apprendi, Ring, and Blakely. This case is no more about sentencing than would a case where a jury convicts an individual of second degree robbery but the judge concludes the individual is guilty of first degree robbery. Apprendi, Ring, and Blakely merely make clear what is an element of a crime. Ring states any judicial finding which increases the maximum penalty is the functional equivalent of an element of a greater offense. Sattazahn establishes that elements for purposes of the Sixth Amendment are elements for purposes of double jeopardy. This case is not about sentencing at all. Instead the only question is whether a court's finding which goes beyond the jury's verdict to enter a conviction of a greater offense than that found to have been committed by the jury in its verdict can be affirmed as harmless. In short, can a reviewing court enter a judgment notwithstanding the jury's verdict. The answer is of course no.

This Court's decision in California v. Monge, 524 U.S. 721 (1998), does not require a different conclusion. Monge concluded that a reversal for sufficiency of the evidence to establish a sentencing factor – proof of a prior conviction - did not implicate double jeopardy provisions because that fact was not an element of a crime nor an "offense." In reaching this result the Court pointed to its then recent decision in Almendarez-Torres v. United States which of course held the fact of recidivism was a sentencing factor in the traditional sense and need not be pleaded and proved to a jury

beyond a reasonable doubt. Monge, 524 U.S. at 728-29 (citing inter alia Almendarez-Torres, 523 U.S. 224 (1998)). Monge stated "[Almendarez-Torres] rejected an absolute rule that an enhancement constitutes an element of the offense any time it increases the maximum sentence to which a defendant is exposed." 524 U.S. at 729. Thus, the critical point for the Court was whether the fact at issue was an element or merely a sentencing factor, and because the Court concluded the fact at issue was not an element, double jeopardy principles were not implicated.

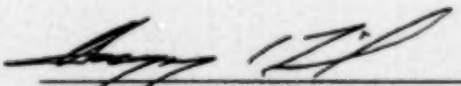
Monge only holds that double jeopardy is not implicated where sentencing factors are involved. But since that time, the Court has adopted an "absolute rule" that facts which increase the maximum penalty are elements and not merely sentencing factors. See, Apprendi, 530 U.S. at 494; Harris, 536 U.S. at 557-58; Ring, 536 U.S. at 609; Sattazahn, 537 U.S. at 111. As there is "no principled reason to distinguish between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause" application of harmless error analysis to this case would violate the Double Jeopardy Clause. See e.g. Sattazahn, 537 U.S. at 111.

The decision of the Washington Supreme Court, while not reaching this issue, is nonetheless consistent with this Court's Double Jeopardy jurisprudence.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted this 11th day of August, 2005.



GREGORY C. LINK
Attorney for Respondent

CERTIFICATION OF ENROLLMENT

SENATE BILL 5477

Chapter 68, Laws of 2005

59th Legislature
2005 Regular Session

SENTENCING REFORM ACT

EFFECTIVE DATE: 4/15/05

Passed by the Senate April 14, 2005
YEAS 46 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House April 12, 2005
YEAS 96 NAYS 1

FRANK CHOPP

Speaker of the House of Representatives

Approved April 15, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5477** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

April 15, 2005 - 5:19 p.m.

Secretary of State
State of Washington

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SENATE BILL 5477

AS AMENDED BY THE HOUSE

Passed Legislature - 2005 Regular Session

State of Washington 59th Legislature 2005 Regular Session

By Senators Kline, Brandland, Hargrove, Esser, Fairley, Kastama, Shin, Pridemore, Weinstein, Haugen, Berkey, Prentice and Rockefeller

Read first time 01/26/2005. Referred to Committee on Judiciary.

AN ACT Relating to sentencing outside the standard sentence range; amending RCW 9.94A.530 and 9.94A.535; adding a new section to chapter 9.94A RCW; creating new sections; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common

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law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. The legislature does not intend to alter how mitigating facts are to be determined under the sentencing reform act, and thus intends that mitigating facts will be found by the sentencing court by a preponderance of the evidence.

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the *Blakely* decision.

Sec. 2. RCW 9.94A.530 and 2002 c 290 s 18 are each amended to read as follows:

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for ((~~those offenses enumerated~~)) other adjustments as specified in RCW 9.94A.533((~~(4) that were committed in a state correctional facility or county jail~~)) shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to section 4 of this act. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in section 4 of this act.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in section 4 of this act. Facts that establish the elements of a more serious crime or

additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2) (d), (e), (g), and (h).

Sec. 3. RCW 9.94A.535 and 2003 c 267 s 4 are each amended to read as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of section 4 of this act.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence ((~~unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW~~)).

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

((~~The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.~~))

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

A4

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered By A Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in section 4 of this act.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance ((~~due to extreme youth, advanced age, disability, or ill health~~)).

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) ((~~The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(k)~~)) The offense resulted in the pregnancy of a child victim of rape.

((~~(l)~~)) (i) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

((~~(m)~~)) (k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

((~~(n)~~)) (l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

NEW SECTION. **Sec. 4.** A new section is added to chapter 9.94A RCW to read as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an

aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

NEW SECTION. **Sec. 5.** (1) The sentencing guidelines commission shall review the sentencing reform act as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing. As part of its review, the commission shall:

(a) Study the relevant provisions of the sentencing reform act, including the provisions in this act;

(b) Consider how to restore the judicial discretion which has been limited as a result of the *Blakely* decision;

(c) Consider the use of advisory sentencing guidelines for all or any group of crimes;

(d) Draft proposed legislation that seeks to address the limitations placed on judicial discretion in sentencing as a result of the *Blakely* decision; and

(e) Determine the fiscal impact of any proposed legislation.

(2) The commission shall submit its findings and proposed legislation to the legislature no later than December 1, 2005.

NEW SECTION. **Sec. 6.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 7.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed by the Senate April 14, 2005.
Passed by the House April 12, 2005.
Approved by the Governor April 15, 2005.
Filed in Office of Secretary of State April 15, 2005.

Supreme Court, U.S.
FILED
AUG 25 2005
OFFICE OF THE CLERK

No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY TO BRIEF IN OPPOSITION

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY TO BRIEF IN OPPOSITION

Petitioner, State of Washington, files this reply to point out six flaws in Recuenco's Brief in Opposition (hereinafter BIO). The points relate to the following: a factual error, a mistaken claim regarding Petitioner's citation to a Washington statute, a mistaken characterization of the "error" that was committed in this case, a mischaracterization as to the impact of the Washington Court's decision, a mischaracterization of the State's arguments, and a clarification that certain Double Jeopardy arguments are not properly before this Court. The arguments in reply are set forth below.

A. Factual Error

In apparent attempt to suggest that harmless error analysis would not assist the State in this case, Recuenco obscures an important factual matter. He says that Petitioner "incorrectly asserts [t]here was no evidence of any other weapon *in the*

assault." BIO at 2 (italics added—citing Petition at 2). He then says that "the evidence established that during the course of the *incident* Mr. Recuenco wielded a metal pipe." BIO at 2 (italics added). He cites a Washington statute providing that a deadly weapon can be defined as "any metal pipe or bar used or intended to be used as a club" and thereby implies that a pipe, not the gun, might have served as a basis for the jury's deadly weapon finding on the assault charge.

The difference between the words *assault* and *incident* are significant in this context. Recuenco indeed smashed a stovetop with a pipe during this *incident*, and he was charged with and convicted of malicious mischief for that conduct. See Petition at 10a-11a. But it has always been clear that whereas the pipe was the instrument of the malicious mischief charge, a gun was alleged to have been used in regard to the *assault charge*. *Id.* at 10a -17a. Nobody argued, alleged, or suggested that the pipe was used as an instrument to assault the victim. In fact, the charging document referred to a handgun being used in the assault, the jury instructions defined deadly weapon in terms of a firearm, the arguments of both lawyers to the trial judge focused on Recuenco's possession of the gun, and the arguments of both lawyers to the jury focused on his use or possession of a gun. Petition at 3a-4a, 10a-11a. Likewise, the appellate challenge to the assault conviction has always focused on Recuenco's use of a gun. *Id.* at 9a-19a.

Thus, it is misleading for Recuenco to suggest that smashing the stove with a pipe had anything whatsoever to do with the deadly weapon special verdict on the assault charge, or that the pipe in any manner affects the legal issue presented in the State's Petition for Writ of Certiorari.

B. Citation Error

Recuenco claims that the State erroneously cited to Wash. Rev. Code § 9.94A.510 in its petition. He claims that the correct statutory citation is to Wash. Rev. Code

§ 9.94A.533. See BIO at 2. Recuenco is mistaken. His crime was committed on September 18, 1999. The statute he cites was not enacted until the year 2002. See Wash. Rev. Code § 9.94A.533 (Historical and Statutory Notes). Under Washington law, the sentencing statute in effect on the date the crime was committed is the statute that controls sentencing. Wash. Rev. Code § 9.94A.345. Thus, Former Wash. Rev. Code § 9.94A.510 (1999) is the statute that applies to his sentencing. The State's citation was incomplete in that it omitted the term "former" and did not include a designated year, but the citation is otherwise correct.

C. The Washington Supreme Court's Decision Forecloses Harmless Error Analysis For Sentencing Error That is Less Egregious than the Constitutional Error in Apprendi and Blakely.

Recuenco claims that this case is a poor vehicle for analyzing harmless error because it involves more egregious error than occurred in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Blakely v. Washington*, 542 U.S. 296 (2004), insofar as the trial judge "enter[ed] a judgment notwithstanding the verdict." BIO at 5-6. This argument is meritless. The trial court here imposed a "firearm" sentence because the evidence unequivocally established that the "deadly weapon" used by Recuenco was a firearm, and Washington law requires a longer sentence for use of a firearm. The trial court essentially imposed judgment on the verdict it believed had been rendered, finding that the failure of the verdict form to expressly mention the term "firearm" did not change the fact that the verdict encompassed the firearm finding. In *Apprendi* and *Blakely*, however, a greater sentence was imposed based on *disputed* findings of fact made by the judge—facts that had never been submitted to a jury in any form. Thus, contrary to Recuenco's claims, the "error" in this case is arguably *less* egregious than the error that occurred in *Apprendi* or *Blakely*.

In any event, the central question presented here is whether sentencing enhancement error is subject to harmless error analysis at all, and whether the instructional error made in this case is more akin to a missing element as in *Neder v. United States*, 527 U.S. 1 (1999), or to the structural error described in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The State argues that this situation is indistinguishable from *Neder*-type error, where the appellate court made a finding on an element that went beyond the jury's express verdict, but where that finding was unquestionably supported by the evidence.

D. Review of Error Under Mandatory Determinate Sentencing Schemes Will Be seriously Impacted by the Decisions of the Washington and North Carolina Supreme Courts.

Recuenco argues that the question presented impacts only a few cases. He is mistaken. He is correct that the impact on federal cases will be minimal, in part because no Federal appellate court has misinterpreted this Court's precedent as the Washington Supreme Court and the North Carolina Supreme Court have done, *see State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), and *State v. Speight*, ___ N.C. ___, 614 S.E.2d 262 (2005), and in part because the federal guidelines are now advisory. Yet, there is considerable confusion in the State courts regarding the constitutional parameters of the harmless error doctrine and the Sixth Amendment. Petition at 14-15.

More importantly, however, Recuenco erroneously suggests that the impact of the Washington Court's decision will decrease over time. It is important to recall, first, that Washington law required the "weapon" question to be decided by a jury, and the question *was* submitted to a jury in this case. The trial court "erred" however, only insofar as it failed to ensure that the jury verdict *expressly* included the firearm finding. Errors like this can occur in *any* sentencing

hearing where the aggravating factor is submitted to a jury. And, contrary to Recuenco's argument, BIO at 8, recent changes to Washington's sentencing laws, requiring nearly all aggravating factors to be decided by a jury, will expand rather than limit the impact of the *Recuenco* decision. See BIO at 8-9 (citing Ch. 68 Laws of Washington 2005, §§ 1-7 amending Wash. Rev. Code §§ 9.94A.530 and .535). Now, any error in finding an aggravating sentencing factor will be per se reversible, meaning this misinterpretation of the federal constitution will have a continuing and broad impact on sentencing in State courts with similar sentencing schemes. Review by this Court is required to correct this misinterpretation of Supreme Court precedent, and to alleviate the confusion in the State courts. See Petition at 7-10, 14-16.

E. Respondent Incorrectly Asserts that the State's Argument Requires a Decision on Whether "Sentencing Enhancements" are Constitutionally Equivalent to "Elements" of a Crime.

Recuenco incorrectly asserts that "[t]he State's argument is premised on the incorrect assertion that neither the deadly weapon nor firearm findings are elements of an offense." BIO at 10-11. The State's argument is not, however, premised on the difference between elements and sentencing enhancements. In fact, whether sentencing enhancements are distinct from elements need not be decided in this case. All this Court needs to hold is that an error in defining a sentencing enhancement will not be held to a higher standard of appellate review than the standard applied to review of missing elements. As stated in the petition, "it would be incongruous to permit harmless error analysis as to a missing element, but to prohibit such analysis as to a misdefined sentencing factor." Petition at 10.

F. Respondent's Double Jeopardy Arguments Were Not Properly Raised in State Court, and Were Never Addressed by the Washington Supreme Court.

Finally, Recuenco's brief in opposition incorrectly suggests that this case presents issues under the Double Jeopardy Clause of the Federal Constitution. It does not. Recuenco belatedly raised such issues in the Washington Supreme Court, the State moved to strike the arguments because they had never been made in the trial court or in the Court of Appeals. The Washington Supreme Court ultimately declined to reach the issue because it reversed Recuenco's sentence. Petition at 8a n. 3. Thus, there is no State Court decision on the double jeopardy issue, and the issue was not properly preserved in any event. It should not be considered by this Court. *Yee v. Escondido,* 503 U.S. 519, 533 (1992) (declining to review issue not properly presented to State court and not decided by State court).

Moreover, his arguments are plainly without merit. The Double Jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. 5. The clause has been construed to encompass three separate constitutional protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *State v. Gocken,* 127 Wash.2d 95, 101, 896 P.2d 1267 (1995). Recuenco's case does not fall into *any* of the three double jeopardy categories: he has not been acquitted of any charge, so there is no prosecution after acquittal; he has only been prosecuted once, so he has not been subject to a second prosecution for the same offense after conviction; and he has not suffered multiple punishments for the same offense. For these reasons, the Double Jeopardy clause is simply inapposite.

Reliance on *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) is also misplaced. *Sattazahn* involved a death sentence imposed in a second trial where the jury in the first trial had deadlocked on the death penalty. This Court held that the State could pursue a death sentence even though such sentence had not been imposed in the original proceeding. The analysis turned on whether the first jury's deadlock was an acquittal on the death penalty. This Court held it was not and, thus, Double Jeopardy did not bar a second trial on the issue. 537 U.S. at 113. There is, however, no second trial, and no acquittal, at issue in Recuenco's case, so *Sattazahn* does not control this case.

CONCLUSION

For these reasons, Petitioner respectfully submits that this case is an excellent vehicle for clearing the confusion that exists, especially in the State courts, regarding whether harmless error analysis may be conducted when a trial court has found a fact that should have been expressly found by a jury.

Respectfully submitted,

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Supreme Court U.S.
FILED
DEC 12 2005
OFFICE OF THE CLERK

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No. 05-83

In the Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

v.

ARTURO R. RECUENCO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an error in enhancing a sentence above the otherwise-applicable statutory maximum based on a finding by the judge rather than the jury is harmless error when it is clear beyond a reasonable doubt that the jury would have made the same finding if asked.

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In the Supreme Court of the United States

No. 05-83

STATE OF WASHINGTON, PETITIONER

v.

ARTURO R. RECUENCO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the issue whether an error in enhancing a sentence above the otherwise-applicable statutory maximum based on a finding by the judge rather than the jury is harmless error when it is clear beyond a reasonable doubt that the jury would have made the same finding if asked. The resolution of that question will affect federal prosecutions in which a court erroneously fails to submit a statutory sentencing factor to the jury. See, *e.g.*, 21 U.S.C. 841(b) (2000 & Supp. II 2002) (establishing graduated penalties, based on amount, for manufacture, distribution, or possession of illegal drugs). The United States therefore has a substantial interest in this case.

STATEMENT

1. On September 18, 1999, respondent was arrested at his home in King County, Washington, following a domestic dispute with his wife, Amy. At respondent's trial, Mrs. Recuenco testified that respondent had yelled at her for not preparing dinner for his sisters, smashed a glass stove top with a metal pipe, and then retrieved a gun from a filing cabinet and pointed it at her. When Mrs. Recuenco called the police, respondent violently yanked on the phone cord, ripping the jack out of the wall. After arriving at the scene, officers heard Mrs. Recuenco shouting that respondent had a gun and was going to kill her. Mrs. Recuenco subsequently showed one of the officers where the gun was located; the gun was found to be loaded. Pet. App. 10a.

As relevant here, respondent was charged with second-degree assault, in violation of Wash. Rev. Code Ann. § 9A.36.021 (West 2000 & Supp. 2005).[1] Respondent was potentially subject to one of two different sentencing enhancements. If respondent was "armed with a firearm" during a Class B felony (such as second-degree assault), the trial court was required to increase his sentence by three years. *Id.* § 9.94A.533(3) (West 2003 & Supp. 2005). If, however, respondent was "armed with a deadly weapon *other than* a firearm," the trial court was required to increase his sentence by only one year. *Id.* § 9.94A.533(4) (emphasis added). A separate statute provided that, if "there has been a special allegation and evidence establishing that the accused * * * was armed with a deadly weapon," the

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[1] Some of the statutory provisions involved in this case have been renumbered, without material revision, since respondent was charged. For convenience, all citations refer to the current versions of the relevant provisions.

jury was required to "find a special verdict as to whether or not the defendant * * * was armed" with that weapon. *Id.* § 9.94A.602 (West 2003). Critically, that statute, unlike the statute containing the sentencing enhancements, did not distinguish between firearms and other deadly weapons. The information contained a special allegation that respondent had been "armed with a deadly weapon, to-wit: a handgun, under the authority of" both statutes. J.A. 3.

2. Respondent was tried in January 2000, before this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which held that any fact, other than a prior conviction, which increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt, and *Blakely* v. *Washington*, 542 U.S. 296 (2004), which made clear, in the specific context of Washington's sentencing regime, that the "statutory maximum" for purposes of *Apprendi* is the maximum sentence that a judge could impose based on the facts admitted by the defendant or reflected in the jury's verdict. At the conclusion of trial, the judge submitted a special-verdict form to the jury with the following question: "Was [respondent] armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?" J.A. 13. Neither party asked that the jury be instructed to determine more specifically whether, if respondent was armed with a deadly weapon, the weapon was a firearm; to the contrary, respondent proposed the same question that was submitted to the jury. J.A. 6.

Both parties appear to have recognized that the relevant "deadly weapon" was a gun (which plainly qualified as a "firearm" under Washington law, see Wash. Rev. Code Ann. § 9A.04.110(6) (West 2000)). At one

point, the judge stated that "there is no dispute in this case that we are talking about a gun." J.A. 16. Although respondent denied that he had *pointed* the gun at his wife, Pet. App. 10a, counsel for respondent sought an instruction on the allegedly lesser included offense of "aiming a firearm," Pet. App. 11a; see Wash. Rev. Code Ann. § 9.41.230 (West 2003). The jury was actually instructed that "[t]he term 'deadly weapon' includes any firearm, whether loaded or not," J.A. 7, and that "[a] pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded," J.A. 8. The jury found respondent guilty of, *inter alia*, second-degree assault, and it found that respondent had been armed with a deadly weapon during the commission of the assault. Pet. App. 4a.

At sentencing, respondent contended that, because the jury had not specifically found that he had been armed with a firearm, he was subject only to the one-year enhancement for being armed with a deadly weapon other than a firearm (and not the three-year enhancement for being armed with a firearm). Pet. App. 4a. Counsel for respondent acknowledged, however, that "the allegation and the basis on which this case was tried was under the theory of a firearm," J.A. 30, and conceded that the fact that respondent had been armed with a firearm had been "pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury," J.A. 37. The judge rejected respondent's argument and imposed the three-year enhancement, thereby increasing respondent's sentence from three months (the base sentence) to 39 months. Pet. App. 4a.[2]

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[2] Although petitioner was also convicted on other counts, the sentence on those counts was suspended. Pet. App. 4a.

3. In a post-*Apprendi* but pre-*Blakely* decision, the Washington Court of Appeals affirmed. Pet. App. 9a-19a. The court reasoned that, even assuming that the jury was specifically required to find that respondent had been armed with a firearm before the firearm enhancement could validly be applied, any error was harmless. *Id.* at 18a. Quoting a Washington Supreme Court decision that in turn quoted this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), the court explained that an error was harmless when the appellate court could conclude beyond a reasonable doubt that the verdict would have been the same absent the error. Pet. App. 18a. The court noted that the information had specified that the deadly weapon that respondent had used was a handgun (and thus a firearm); that the prosecution had argued that respondent had committed the assault with a firearm; that the jury had found that respondent had committed the assault with a deadly weapon; and that no other weapon had been mentioned. *Ibid.*

4. In the wake of this Court's decision in *Blakely*, the Washington Supreme Court, considering the case together with other cases presenting *Blakely* issues, reversed and remanded for resentencing. Pet. App. 1a-8a. The court held that the trial court had committed a *Blakely* error by applying the firearm enhancement, see *id.* at 6a-7a, and that the error was not subject to harmless-error analysis under the court's simultaneous decision in *State* v. *Hughes*, 110 P.3d 192 (Wash. 2005). Pet. App. 8a.

In *Hughes*, the Washington Supreme Court held that *Blakely* errors could never be harmless. Pet. App. 20a-27a. In so doing, the court relied heavily on this Court's decision in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), which held that a constitutionally defective reasonable-

doubt instruction could never give rise to harmless error. Pet. App. 21a-23a. The court reasoned that, where an invalid reasonable-doubt instruction had been given, "there was nothing upon which to apply the harmless error analysis to conclude that, but for the error, the result would have been the same." *Id.* at 23a. That situation, the court explained, was "directly analogous" to the instant situation, because "there was no jury finding beyond a reasonable doubt of aggravating factors warranting an enhanced sentence." *Ibid.* "It would be illogical," the court concluded, "to perform harmless error analysis on the absence of those findings." *Ibid.*

The Washington Supreme Court further determined that *Hughes* was not analogous to *Neder* v. *United States*, 527 U.S. 1 (1999), which held that the omission of an element of the offense from the jury's instruction could constitute harmless error. Pet. App. 26a-27a. The court reasoned that, "[a]lthough *Neder* involved the situation where a jury did not find facts supporting every element of the crime, it still returned a guilty verdict." *Id.* at 27a. "Like traditional harmless error analysis cases," the court continued, "the reviewing court could ask whether but for the omission in the jury instruction, the jury would have returned the *same* verdict." *Ibid.* "Where *Blakely* violations are at issue, however, the jury necessarily did *not* return a special verdict or explicit findings on the aggravating factors supporting the exceptional sentence." *Ibid.* Instead, the court reasoned, "[t]he reviewing court asks whether but for the error, the jury would have made *different* or new findings." *Ibid.* Because the court found the better analogy to be to *Sullivan*, not *Neder*, it concluded that "[h]armless error analysis cannot be

conducted on *Blakely* Sixth Amendment violations." *Ibid.*[3]

SUMMARY OF ARGUMENT

A trial court's error in enhancing a sentence above the otherwise-applicable statutory maximum based on a finding by the judge rather than the jury is harmless error when it is clear beyond a reasonable doubt that the jury would have made the same finding if asked. This Court has held that an error is intrinsically harmful, or "structural," only in a limited number of contexts in which the error infects the entire trial process or otherwise renders a trial fundamentally unfair. In a series of other cases, by contrast, this Court has held that various errors in jury instructions concerning elements of the charged offense can be harmless. Most notably, in *Neder* v. *United States*, 527 U.S. 1 (1999), the Court held that the omission of a jury instruction on an offense element does not constitute structural error.

It logically follows from *Neder*'s holding—that the failure to obtain a jury finding on an element of an offense is not structural error—that the failure to obtain a finding on a sentence-enhancing fact, in violation of *Apprendi* and its progeny, is not structural error either. In both cases, the jury has not made a

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[3] The Washington Supreme Court appears to have applied federal law in holding that *Blakely* errors could never be harmless. At a minimum, federal law establishes a floor for determining whether particular federal constitutional errors can be subject to harmless-error review, see *Connecticut* v. *Johnson*, 460 U.S. 73, 81 n.9 (1983) (plurality opinion); *Chapman* v. *California*, 386 U.S. 18, 21 (1967), and for determining when those errors are in fact harmless, see *id.* at 24 (applying "beyond a reasonable doubt" standard); cf. *State* v. *Linehan*, 56 P.3d 542, 549 (Wash. 2002) (applying same standard), cert. denied, 538 U.S. 945 (2003).

necessary factual finding to support the judgment. And in both cases, a reviewing court can review the evidence to determine whether it is clear beyond a reasonable doubt that the jury would have made the requisite finding if it had been asked to do so. There is no basis for distinguishing the error in this case from the error in *Neder*.

In *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), this Court held that an error in jury instructions is structural when it undermines *all* of the jury's findings, not when it merely prevents the jury from making an *additional* finding on a single issue. The strand of reasoning in *Sullivan* that harmless-error analysis cannot be conducted at all when the jury has not made a finding on a particular issue was expressly rejected in *Neder*, 527 U.S. at 11-13, and it cannot support a finding of structural error here. Nor can *Neder* be distinguished on the ground that the jury here returned a verdict only for the original offense and not the "enhanced" offense. The appropriate inquiry for purposes of harmless-error analysis is not whether the verdict would have been the same, but rather whether the overall *outcome* of the proceedings (here, the sentence) would have been the same absent the challenged error.

Finally, the error in this case cannot be deemed automatically harmful simply because a defendant necessarily would have received a lower sentence if the judge had not erroneously imposed a higher sentence based on a fact not found by the jury. Although an error of this type is realized only at sentencing, the essence of the constitutional violation is reliance on a finding by the judge *rather than the jury* on the sentence-enhancing fact. Because the Sixth Amendment issue turns on the absence of the *jury finding*, that omission—and its impact—is critical to whether

the error caused prejudice. In this case, because the relevant fact was established by overwhelming and "uncontroverted" evidence, *Neder*, 527 U.S. at 18, it is clear beyond a reasonable doubt that the jury would have found that fact if it had been asked to do so, and the error is therefore harmless.

ARGUMENT

I. THE ABSENCE OF A JURY FINDING ON A FACT USED TO ENHANCE A SENTENCE BEYOND THE OTHERWISE-APPLICABLE MAXIMUM IS SUBJECT TO HARMLESS-ERROR REVIEW

In *Blakely* v. *Washington*, 542 U.S. 296 (2004), this Court made clear that it is constitutional error for a judge to impose a sentence above the otherwise-applicable maximum based on a fact, other than a prior conviction, not reflected in the jury's verdict.[4] Like most constitutional error, however, a *Blakely* error is subject to harmless-error analysis. Such an error should be found harmless when a reviewing court concludes that it is clear beyond a reasonable doubt that the jury would have found the omitted fact if it had been asked to do so, such that the outcome would have been the same absent the error.

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[4] In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court first held that any fact, other than a prior conviction, which increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Blakely* involved the "appl[ication]" of the general rule expressed in *Apprendi* to the specific context of statutory sentencing enhancements, see 542 U.S. at 301, and, for present purposes, *Apprendi* and *Blakely* errors are materially indistinguishable.

A. The Failure To Submit An Element Of The Offense To The Jury Is Subject To Harmless-Error Review

1. The widespread adoption of harmless-error rules in American jurisprudence occurred in the early twentieth century, arising out of concern that appellate courts were reversing criminal convictions on the basis of mere technical errors. See *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946). This Court later held that at least some constitutional errors, like non-constitutional errors, may be harmless and thus do not require reversal. See *Chapman* v. *California*, 386 U.S. 18, 22 (1967). It is now recognized that "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). In cases involving constitutional error, the harmless-error doctrine, which applies when the defendant made a timely objection at trial, requires an appellate court to disregard the error where it is clear beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 7 (1999).[5]

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[5] Where the error at issue is not of constitutional dimension, or where the error is of constitutional dimension but is being reviewed in the context of a federal habeas proceeding, the reviewing court is instead required to determine whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776; see *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993) (applying *Kotteakos* standard to federal habeas review); cf. Fed. R. Crim. P. 52(a) (stating, without distinguishing between constitutional and non-constitutional error, that "[a]ny error * * * that does not affect substantial rights must be disregarded"). In the federal system, when the defendant has failed to preserve the claim of error, the defendant is required to carry the burden of establishing plain error. *United States* v. *Cotton*, 535 U.S. 625, 631-634 (2002); *Johnson* v. *United States*, 520

This Court has identified a narrow class of fundamental constitutional errors as so intrinsically harmful that they require reversal without inquiry into whether they had an effect on the outcome. Errors are intrinsically harmful, or "structural," only when they "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993); "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986); or affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 309, 310. In *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997), and *Neder*, 527 U.S. at 8, this Court listed six examples of structural error: (1) a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); (2) the complete denial of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); (3) the denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); (4) the denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); (5) racial discrimination in selection of a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); and (6) the administration of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

Consistent with its view that errors are structural "only in a very limited class of cases," *Johnson* v. *United States*, 520 U.S. at 468, this Court has concluded that most constitutional errors are susceptible of harmless-error analysis. See, *e.g.*, *Fulminante*, 499 U.S. at 306-307 (listing examples); cf. *Rose*, 478 U.S. at 579 (noting that, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong

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U.S. 461, 466 (1997); *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993).

presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis"). In a number of cases, the Court has held that errors in jury instructions concerning an element of the charged offense can be harmless. See, *e.g.*, *Yates* v. *Evatt*, 500 U.S. 391 (1991) (erroneous rebuttable presumption); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497 (1987) (misstatement of element); *Rose* v. *Clark*, *supra* (erroneous rebuttable presumption). In *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam), the Court held that harmless-error analysis could apply where the trial court erroneously failed to instruct the jury that it could convict the defendant on a theory of aiding and abetting only if it found that the defendant had the intent of aiding the principal's crime. *Id.* at 3. After noting that the error could equally be characterized as the "misdescription" of an element of the crime (*i.e.*, the element of *mens rea*) or the "omission" of an element (*i.e.*, the element of intent to aid the principal), the Court concluded that the error was subject to harmless-error analysis, under the less stringent standard applicable to constitutional claims raised in federal habeas proceedings. *Id.* at 5-6; see p. 10, note 5, *supra*.

2. In *Neder*, the Court held that the failure to instruct the jury on an element of the offense does not constitute structural error. 527 U.S. at 8-15. The error at issue in *Neder* was the failure to submit the element of materiality to the jury in a tax-fraud case. *Id.* at 4. The Court reasoned that "[t]he error at issue here * * * differs markedly from the constitutional violations we have found to defy harmless-error review." *Id.* at 8. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge," the Court

explained, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. To the contrary, the Court noted that "[the defendant] was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel," and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [the defendant's] defense against the tax charges." *Ibid.* The Court reasoned that its holding was "dictate[d]" by its earlier decisions in cases such as *Pope*, *Carella*, and *Roy*, which held that errors in jury instructions concerning an element of the charged offense could be harmless. *Id.* at 13.

The Court further concluded that the error at issue was in fact harmless. *Neder*, 527 U.S. at 15-20. The Court held that such an error was harmless when it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18. That standard was met, the Court concluded, because the record evidence supporting the existence of the omitted element was "so overwhelming" that the defendant had not even contested it. *Id.* at 16. In reaching that conclusion, the Court rejected the argument that a reviewing court would effectively serve as a "second jury" by engaging in harmless-error analysis of the failure to instruct on an element of the offense. *Id.* at 19. Instead, the Court noted, a reviewing court, "in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Ibid.* "If the answer to that question is 'no,'" the Court explained, "holding the error harmless does not reflect a denigration of the constitutional

rights involved." *Ibid.* (citation and internal quotation marks omitted). The Court likewise rejected the slippery-slope argument that treating the failure to instruct the jury on a single element as harmless error would effectively endorse directed verdicts in criminal cases. *Id.* at 17 n.2. The Court reasoned that "our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach." *Ibid.*

B. Reliance On A Sentence-Enhancing Fact That Was Not Submitted To The Jury Is Constitutionally Equivalent To Failing To Submit An Element Of The Offense To The Jury

1. The error at issue in this case (*i.e.*, reliance on a fact found by the judge, rather than the jury, to enhance a sentence beyond the statutory maximum) is closely analogous to the error at issue in *Neder* (*i.e.*, entry of a judgment of conviction after a failure to instruct the jury to find an element of the offense). The main difference—that the jury's findings here, unlike in *Neder*, were sufficient to support a conviction for an offense—is not material. In both settings, the trial court has failed to secure a finding by the jury, the body that is constitutionally empowered to make it, on one of the issues necessary to support the judgment. And in both settings, the error is harmless when the record reveals that the same outcome would have resulted if the issue had been submitted to the jury under proper instructions.

a. Like the error in *Neder*, the sentencing court's finding of a sentence-enhancing fact that should instead have been found by the jury is not a structural defect. The error does not "infect the entire trial process" or "necessarily render a trial fundamentally unfair."

Neder, 527 U.S. at 8 (citations omitted). Like the defendant in *Neder*, respondent had counsel and was tried before an impartial tribunal. *Id.* at 9.[6] The challenged error does not affect the jury's verdict, but instead affects only the finding that supported the enhanced sentence. The type of error at issue here thus bears no relation to the pervasive and fundamental errors that this Court has held to be structural. See pp. 10-12, *supra*. Instead, the error should be treated like the error at issue in *Neder*. This Court has suggested that a sentence-enhancing fact is the "functional equivalent" of an element of the offense. *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 n.19 (2000). It follows that an error in relying on a judge-found, rather than a jury-found, sentence-enhancing fact is, for constitutional purposes, the "functional equivalent" of entering judgment on a verdict where the judge, rather than the jury, has decided an element of the offense. In *Neder*, this Court held that the absence of a jury finding on an offense element does not constitute structural error; the same reasoning applies to the absence of a jury finding on a sentence-enhancing fact.[7]

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[6] Here, of course, unlike in *Neder*, the relevant statute permited the judge to find the relevant fact. After *Blakely*, it is clear that the Constitution renders such judicial factfinding insufficient. But the fact that the factfinding proceeded as permitted by statute certainly cannot render the error here any more structural than the error in *Neder*.

[7] As this Court noted in *Neder*, 527 U.S. at 17 n.2, the *degree* of constitutional error is relevant in determining whether an error can be harmless. Compare *United States* v. *Cronic*, 466 U.S. 648, 659 (1984) (holding that complete denial of counsel mandates reversal in all cases), with *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (holding that ineffective assistance of counsel requires reversal only upon showing of "reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable

As with the error in *Neder*, a reviewing court can readily apply harmless-error principles in evaluating the imposition of a sentence that exceeds the otherwise-applicable maximum on the basis of a fact not found by the jury. This Court has repeatedly noted that the task of a reviewing court in applying harmless-error analysis is to review the entire record. See, *e.g.*, *Yates*, 500 U.S. at 409; *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983); cf. *United States* v. *Vonn*, 535 U.S. 55, 75-76 (2002) (noting that reviewing court should consider entire record in assessing effect of violation of Fed. R. Crim. P. 11). If the reviewing court determines that the record does not "contain[] evidence that could rationally lead to a contrary finding," *Neder*, 527 U.S. at 19, and concludes that it is clear beyond a reasonable doubt that the jury would have found the omitted fact if it had been asked to do so, the error is harmless, because the defendant would have received the same sentence if the right to a jury finding on the sentence-enhancing fact had been observed.

As in *Neder*, applying harmless-error review to the imposition of sentence without securing a jury finding on a sentence-enhancing fact appropriately balances "society's interest in punishing the guilty" against the constitutional right to a trial by jury. *Neder*, 527 U.S. at 18 (quoting *Connecticut* v. *Johnson*, 460 U.S. at 86 (plurality opinion)). The jury's function of "guard[ing]

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doubt respecting guilt"). But this case, like *Neder*, involves the absence of a jury verdict on *one* of the facts necessary to support the judgment; it does not involve a total deprivation of a jury verdict. Indeed, in this case, like a hypothetical case identical to *Neder* except that the omission of the element would result in a verdict that would support a conviction for a lesser included offense, the verdict covers every element of a criminal offense.

against a spirit of oppression and tyranny on the part of rulers" is not "fundamentally undermine[d]," *id.* at 19, where the jury finds all of the facts essential to the defendant's enhanced sentence, with the exception of a single fact, and where the reviewing court concludes that any rational jury would have found that fact as well. In that context, the harmless-error doctrine "serve[s] a very useful purpose insofar as [it] block[s] setting aside [the defendant's sentence] for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22.

b. This Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), supports the application of harmless-error analysis to *Blakely* error. At issue in *Cotton* was the failure to charge or to secure a jury finding on drug quantity, which was used to enhance the defendants' sentences under 21 U.S.C. 846. Because the defendants in *Cotton* did not preserve their objection at trial, the case involved the federal plain-error doctrine, which applies when the defendant failed to make a timely objection in the district court. Fed. R. Crim. P. 52(b). Under that doctrine, a reviewing court asks whether (1) there is error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. at 466-467. The third component of the plain-error inquiry—*i.e.*, whether the error affects substantial rights—largely tracks the harmless-error inquiry applicable when a defendant did make a timely objection at trial.[8]

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[8] The primary difference between the harmless-error inquiry and the third component of the plain-error inquiry is that "the

In *Cotton*, the Court held that the failure to charge in the indictment and prove to the jury a fact that was used to enhance the sentence beyond the statutory maximum, in violation of *Apprendi*, did not constitute reversible plain error. 535 U.S. at 631-634. Although the Court did not pass specifically on the question whether the third component of the plain-error inquiry was satisfied, it concluded that the fourth component was not satisfied because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 632-633. In so concluding, the Court noted that the evidence concerning the sentence-enhancing fact was "overwhelming" and "essentially uncontroverted." *Id.* at 633.

The Court's holding in *Cotton* that *Apprendi* error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings strongly suggests that *Apprendi* (or *Blakely*) error is not structural as well. Indeed, in *Neder*, the Court relied on its earlier decision in *Johnson* v. *United States*, which similarly held that the error at issue did not satisfy the fourth component of the plain-error inquiry, in determining that the error was not structural. *Neder*, 527 U.S. at 9. The Court noted that, "[a]lthough reserving the question whether the omission of an element *ipso facto* 'affect[s] substantial rights,' we concluded [in *Johnson*] that the error did not warrant correction in light of the 'overwhelming' and 'uncontroverted' evidence supporting materiality." *Ibid.* (citations omitted).

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tables are turned on demonstrating the substantiality of any effect on a defendant's rights." *Vonn*, 535 U.S. at 62-63. In the plain-error inquiry, the defendant bears the burden of proving that the error *does* affect his substantial rights. *Olano*, 507 U.S. at 734-735; see *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004).

So too here, the Court's decision in *Cotton*—specifically, its determination that an *Apprendi* error does not seriously affect the fairness of judicial proceedings where the evidence concerning the omitted fact was "overwhelming" and "essentially uncontroverted," 535 U.S. at 633—"cuts against the argument that [the error] at issue will *always* render [the outcome] unfair." *Neder*, 527 U.S. at 9.

2. The Washington Supreme Court concluded that a *Blakely* error was "readily distinguishable" from the type of error at issue in *Neder*. Pet. App. 27a. There is no valid basis, however, for that distinction.

a. In holding that a *Blakely* error was not subject to harmless-error analysis, the Washington Supreme Court relied heavily on this Court's decision in *Sullivan* v. *Louisiana*, *supra*. Pet. App. 21a-23a. In *Sullivan*, the Court unanimously held that a defective reasonable-doubt instruction gave rise to structural error. 508 U.S. at 281-282. The Court reasoned that such an instruction, unlike an instruction that merely "erect[ed] a presumption regarding an element of the offense," "vitiate[d] *all* the jury's findings" and thereby produced "consequences that are necessarily unquantifiable and indeterminate." *Id.* at 280, 281, 282. In a particular line of reasoning on which the Washington Supreme Court relied, however, this Court further stated that, when such an instruction is given, "there has been no jury verdict within the meaning of the Sixth Amendment"; thus, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* at 280. The Court added that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action * * *; it requires an actual jury finding of guilty." *Ibid.*

Standing alone, that line of reasoning from *Sullivan* would seemingly support the conclusion that *any* instructional error concerning an offense element (or a sentence-enhancing fact) is structural, insofar as the reasoning suggests that it is never appropriate for a reviewing court to determine what a jury would have found in the absence of an error. See Pet. App. 23a (stating that this Court has held that "speculating on the jury's verdict * * * is never allowed"). But such a reading of *Sullivan* could not be reconciled with a host of this Court's other precedents, as this Court pointed out in *Neder*. 527 U.S. at 11-15; see *Sullivan*, 508 U.S. at 282-285 (Rehnquist, C.J., concurring). While the Court in *Neder* endorsed the reasoning in *Sullivan* that an error was structural where it "vitiat[ed] *all* the jury's findings," *Neder*, 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 281), the Court determined that the error at issue in *Neder* did not satisfy that standard, because it merely prevented the jury from making a finding on a single element of the offense. *Id.* at 10-11. The Court then proceeded expressly to disavow the "alternative reasoning" of *Sullivan*, on which the defendant in *Neder* had relied. *Id.* at 11. The Court explained that, "[a]lthough this strand of the reasoning in *Sullivan* does provide support for [the defendant's] position, it cannot be squared with our harmless-error cases." *Ibid.* Specifically, the Court cited its earlier decisions in *Pope*, *Carella*, and *Roy*, which held that errors in jury instructions concerning offense elements could be harmless. *Id.* at 11-13. The Court reasoned that "the absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guaran-

tee"—not the further proposition that such an error was structural. *Id.* at 12.

In *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam), the Court reiterated that understanding of *Sullivan*. In *Mitchell*, a defendant convicted of capital murder filed a federal habeas petition, claiming, *inter alia*, structural error because the indictment failed to charge him as a "principal offender." *Id.* at 14. The Court unanimously held that the defendant's claim lacked merit. *Id.* at 19. The Court rejected the court of appeals' reasoning that the failure to charge the defendant as a "principal" was the "functional equivalent" of "dispensing with the reasonable doubt requirement." *Id.* at 16 (citation omitted). In so doing, the Court noted that, in *Neder*, it had "explicitly distinguished *Sullivan* because the error in *Sullivan* * * * '"vitiat[ed] *all* the jury's findings,"' whereas the trial court's failure to instruct the jury on one element of an offense did not." *Ibid.* (citations omitted). "Where the jury was precluded from determining only one element of an offense," the Court concluded, "we held that harmless-error review is feasible." *Ibid.*

Under a proper understanding of *Sullivan*, a *Blakely* error—like the error in *Neder*—is not structural. The error in *Neder* did not "vitiate[] *all* the jury's findings," *Sullivan*, 508 U.S. at 281, but instead simply prevented the jury from making an *additional* finding on a single offense element. Similarly, the trial court's error in this case does not undermine any of the findings that the jury actually made; instead, the trial court's error was in relying on one additional fact, which the jury had not been asked to find, in imposing sentence. Moreover, the error in *Neder* did not produce "consequences that are necessarily unquantifiable and indeterminate," *Neder*, 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 282), be-

cause a reviewing court can reliably determine whether the error was prejudicial by examining the record and assessing whether it is clear beyond a reasonable doubt that the jury would have found the omitted element. The trial court's error in this case can be analyzed for harmlessness in the same way as in *Neder*: a reviewing court can examine the record and assess whether it is clear beyond a reasonable doubt that the jury would have found the omitted fact. Under *Sullivan*, therefore, a *Blakely* error does not constitute a structural error necessitating automatic reversal.

b. The Washington Supreme Court suggested that the error in this case was distinguishable from the error in *Neder* because the *Neder* jury "still returned a guilty verdict" for the offense in question, even though the jury "did not find facts supporting every element" of that offense, and "the reviewing court could ask whether[,] but for the [error], the jury would have returned the *same* verdict." Pet. App. 27a. In this case, by contrast, the jury "necessarily did *not* return a * * * verdict" for the "enhanced" offense. *Ibid.* Accordingly, the Washington Supreme Court concluded, "there is no basis upon which to conduct a harmless error analysis." *Ibid.*; see Br. in Opp. 6 (suggesting that, in this case, the judge "necessarily is making its own determination as to proper verdict" and "[is] setting aside the jury's verdict").[9]

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[9] In *Neder*, the defendant contended that there was no *valid* verdict because the jury had failed to make findings on all of the elements of the relevant offense. 527 U.S. at 11. The Court, however, rejected that contention on the ground that it had previously applied harmless-error analysis in similar circumstances. *Id.* at 11-13.

That reasoning is fundamentally flawed, because the appropriate "basis upon which to conduct a harmless error analysis" in this case is not the jury's verdict, but rather the judge's sentence. In cases involving *trial* errors, this Court has frequently stated that the test for harmless-error analysis is whether it is clear beyond a reasonable doubt that, but for the error, the *verdict* would have been the same. See, *e.g.*, *Neder*, 527 U.S. at 17 (stating that, "where a reviewing court concludes beyond a reasonable doubt that * * * the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless"); *Chapman*, 386 U.S. at 24 (requiring "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). In other cases, however, the Court has framed the relevant inquiry as whether the error affected the "outcome" or "result" of proceedings in the trial court more generally. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 734 (1993); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986); *Berkemer* v. *McCarty*, 468 U.S. 420, 444 (1984). That more generic formulation is correct, because this Court has applied harmless-error analysis (or has analogously applied the third component of plain-error analysis) not only to pure trial errors (with respect to which it is natural to ask whether the *verdict* would have been the same), see, *e.g.*, *Neder*, 527 U.S. at 17; *Yates*, 500 U.S. at 405; *Chapman*, 386 U.S. at 25-26; *Kotteakos*, 328 U.S. at 764-765; but also to errors in grand jury proceedings, see *Bank of Nova Scotia*, 487 U.S. at 263; errors at detention hearings, see *Montalvo-Murillo*, 495 U.S. at 722; errors in plea proceedings, see *United States* v.

Dominguez Benitez, 542 U.S. 74, 83 (2004); and, most critical for present purposes, sentencing errors, see, *e.g.*, *Richmond* v. *Lewis*, 506 U.S. 40, 49 (1992); *Williams* v. *United States*, 503 U.S. 193, 203 (1992); *Parker* v. *Dugger*, 498 U.S. 308, 319 (1991). The correct inquiry here, therefore, is whether, if the judge had secured a finding from the jury rather than relying on a fact found by the court, the sentence that respondent received—and thus the outcome of proceedings below—would have been the same.

By focusing on whether "the jury would have returned the *same* verdict" but for the error, Pet. App. 27a, the Washington Supreme Court's rule would lead to different results in functionally indistinguishable cases. Suppose, for example, that the jury in this case had been permitted to return a verdict finding an "enhanced offense" under Wash. Rev. Code Ann. § 9.94A.533(3) (West 2003 & Supp. 2005) (which contains the firearms enhancement), but had not been instructed specifically to determine whether respondent was armed with a firearm. If the jury had returned a verdict finding the defendant guilty of the "enhanced offense" and the judge had imposed the enhanced sentence, the *Blakely* error (in failing to secure a necessary factual finding from the jury) would presumably be subject to harmless-error analysis under the Washington Supreme Court's reasoning. That would be the case simply because the jury returned a complete verdict on the "enhanced" offense, rather than, as here, a verdict only on the "unenhanced" offense of second-degree assault *simpliciter*. There is no basis for drawing such an arbitrary and formalistic distinction between those two cases. In each case, the reviewing court should instead consider whether the *sentence*, although imposed without the requisite jury

finding, would have been the same absent the challenged error.[10]

c. Some defendants challenging *Blakely* (or *Apprendi*) errors have contended that, even if the appropriate analysis is whether the *sentence* would have been the same absent the challenged error, such an error is automatically not harmless. See, *e.g.*, *United States* v. *Vazquez*, 271 F.3d 93, 101 (3d Cir. 2001) (en banc) (rejecting that claim), cert. denied, 536 U.S. 963 (2002). Those defendants contend that the error in question occurs only at the time of sentencing, when a judge imposes a sentence above the otherwise-applicable maximum based on a fact not found by the jury. If that error had not occurred at that juncture, the reasoning goes, the sentence necessarily would not have been the same, because a defendant would not have received an enhanced sentence at all.

That argument, however, fundamentally misapprehends the nature of a *Blakely* error. A *Blakely* error does constitute "sentencing error" insofar as it is fully *realized* only at sentencing, when a judge imposes a sentence above the otherwise-applicable maximum based on a fact not found by the jury. A *Blakely* error, however, critically depends on the failure to secure a

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[10] At one point in its analysis, the Washington Supreme Court suggested that it would be inappropriate for a reviewing court engaging in harmless-error analysis to ask whether, but for the error, "the jury would have made *different* or *new* findings," because such a court would be "speculat[ing] on what [the jury] would have done if [it] had been asked to find different facts." Pet. App. 27a. In *Neder*, however, the Court endorsed precisely such an inquiry: namely, whether the jury would have found an element of the offense if an instruction concerning that element had been given. See 527 U.S. at 19.

jury finding on the sentence-enhancing fact.[11] The "trial" and "sentencing" components of a *Blakely* error are inextricably intertwined. "On the one hand, the trial error exists only because of the sentencing error[;] [o]n the other hand, the sentencing error cannot occur without the trial error." *Vazquez*, 271 F.3d at 101.

It would be wholly artificial to focus solely on the "sentencing" component of a *Blakely* error, rather than on the entirety of the error, in determining whether the error is harmless—particularly because the Sixth Amendment issue arises only because of the absence of a jury finding to support the sentence.[12] When a

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[11] Lower courts have consistently held that an objection to a *Blakely* (or *Apprendi*) error is timely if it is made at sentencing. See, *e.g.*, *United States* v. *Stewart*, 306 F.3d 295, 309-313 (6th Cir. 2002), cert. denied, 537 U.S. 1138, 537 U.S. 1146, and 538 U.S. 1036 (2003); *United States* v. *Candelario*, 240 F.3d 1300, 1304-1305 (11th Cir.), cert. denied, 533 U.S. 922 (2001); *United States* v. *Garcia-Guizar*, 234 F.3d 483, 488 (9th Cir. 2000), cert. denied, 532 U.S. 984 (2001); *United States* v. *Doggett*, 230 F.3d 160, 165 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001). Those courts, however, have also held that a defendant could preserve his objection to a *Blakely* error by making it when the jury is being instructed—although a defendant may have no incentive to do so under a regime in which the defendant need not object until sentencing. See, *e.g.*, *Candelario*, 240 F.3d at 1305 (noting that "a defendant's constitutional objection will be timely if made at any time prior to sentencing").

[12] That artificiality is underscored by comparing a *Blakely* error to the omission of an element that marks the boundary between greater and lesser included offenses. In both cases, the consequences of the omission may not be felt until sentencing, but *Neder*'s analysis is fully applicable to a case in which the omitted element makes a difference between a greater and lesser included offense. See, *e.g.*, *United States* v. *Riley*, 250 F.3d 1303, 1307 (11th Cir. 2001) (per curiam) (applying harmless-error analysis to error under *Castillo* v. *United States*, 530 U.S. 120 (2000), in failing to obtain jury finding on firearm-type element of a greater offense

Blakely error is committed, the core of the constitutional violation is the failure to submit to the jury a sentence-enhancing fact that the jury should have found on proof beyond a reasonable doubt. And when it is clear beyond a reasonable doubt that the jury, if asked, would have found the sentence-enhancing fact, and thus that the defendant would have received the same sentence after being found guilty of the "enhanced" offense, any error in failing to submit that fact to the jury (and imposing an enhanced sentence) was harmless. Just as a *Blakely* error is not structural, therefore, so too is it not automatically harmful.

II. THE ABSENCE OF A JURY FINDING ON THE FACT THAT RESPONDENT HAD BEEN ARMED WITH A FIREARM WAS HARMLESS

Should the Court conclude that *Blakely* errors are subject to harmless-error analysis, it would be appropriate for this Court to determine that the error at issue in this case was harmless as a matter of first instance. This Court has noted that, "[a]lthough our usual practice in cases like this is to reverse and remand for a new determination under the correct standard, we have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance." *Yates*, 500 U.S. at 407. In *Neder*, the Court determined that the failure to instruct the jury to find the element of materiality was harmless, noting that "[t]he evidence supporting materiality was

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under 18 U.S.C. 924(c)); *United States* v. *Shea*, 211 F.3d 658, 672 (1st Cir. 2000) (applying harmless-error analysis to error under *Jones* v. *United States*, 526 U.S. 227 (1999), in failing to obtain jury finding on bodily-injury element of a greater offense under the carjacking statute, 18 U.S.C. 2119), cert. denied, 531 U.S. 1154 (2001). It likewise should be fully applicable here.

so overwhelming * * * that [defendant] did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial." 527 U.S. at 16.

In this case, because there was "overwhelming" and "essentially uncontroverted" evidence (*Cotton*, 535 U.S. at 633) that respondent had been armed with a firearm during the assault for which he was convicted, it is clear beyond a reasonable doubt that the jury would have found that fact if it had been asked to do so. The information in this case specifically alleged that the deadly weapon that respondent had used was a handgun (and thus a firearm). J.A. 3. Although neither party asked that the jury be instructed to determine whether, if respondent was armed with a deadly weapon, the weapon was a firearm, both parties appear to have operated on the assumption that the deadly weapon at issue was a gun. Counsel for respondent sought an instruction on the allegedly lesser included offense of "aiming a firearm," Pet. App. 11a. While the jury was not instructed to determine whether the deadly weapon at issue was a firearm, it was instructed that "[a] pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." J.A. 8. Finally, counsel for respondent acknowledged that "the allegation and the basis on which this case was tried was under the theory of a firearm," J.A. 30, and conceded that the fact that respondent had been armed with a firearm had been "pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury," J.A. 37. Because respondent did not "contest[] the omitted [fact]" or "raise[] evidence sufficient to support a contrary finding," *Neder*, 527 U.S. at 19, any error in imposing an enhanced sentence without securing a jury finding on that fact was harmless.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

Respectfully submitted.

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DECEMBER 2005

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No. 05-83

FILED
[illegible] 14 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

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QUESTION PRESENTED

Whether error as to the definition of a sentencing enhancement, which results in a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is subject to harmless error analysis.

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IN THE

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STATE OF WASHINGTON,

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at *State v. Recuenco*, 154 Wash.2d 156, 110 P.3d 188 (Apr. 14, 2005). Pet. App. 1a.[1] The Court of Appeals' decision in this case is unpublished, 117 Wash.App. 1079, 2003 WL 21738927 (Wash.App. July 28, 2003). Pet. App. 9a.

JURISDICTION

The Washington Supreme Court's judgment was entered on April 14, 2005. The petition for writ of certiorari was filed on July 13, 2005, and was granted on October 17, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Former Wash. Rev. Code § 9.94A.125 provides in relevant part: "In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, . . . if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime. For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm. . . ."

Former Wash. Rev. Code § 9.94A.310 provides in pertinent part: "(3) The following additional times shall be added to the presumptive sentence . . . if the offender or an accomplice was armed with a firearm. . . Three years for any felony defined under any law as a class B felony. . . . (4) The following additional times shall be added to the presumptive sentence . . . if the offender or an accomplice was armed with a deadly weapon as defined in this chapter other than a

firearm. . . One year for any felony defined under any law as a class B felony. . . ."

STATEMENT

1. On September 18, 1999, Ms. Amy Recuenco and the defendant, Arturo Recuenco, were at home with their children. The defendant told Ms. Recuenco to cook dinner for his sisters, who were scheduled to arrive that evening. Tr. 6:486. The defendant became enraged when he later discovered that Ms. Recuenco had not prepared the meal, and he picked up a metal pipe and hit the stove, smashing it. Tr. 6:488. The defendant then walked into the living room, reached into a file cabinet, and removed his gun. Tr. 6:491. He pointed the gun at Ms. Recuenco with both hands and continued to yell at her. Tr. 6:491. Ms. Recuenco picked up the telephone and dialed 911. Tr. 6:493. The defendant put the gun back in the drawer and yanked the telephone cord from the wall just after the call had gone through to the 911 call center. Tr. 5:244, 6:495. Ms. Recuenco fled to her room. Tr. 6:497.

Two Seattle Police Department officers arrived. Tr. 5:228-31. They immediately heard Ms. Recuenco shout from inside that the defendant had a gun and was going to kill her. Tr. 5:233. After speaking privately with Ms. Recuenco, an officer retrieved the defendant's gun—a .380 caliber, semi-automatic pistol with a full magazine but without a round in the chamber. Tr. 5:233-39. After he was arrested, the defendant admitted to the police that he had held the gun during the altercation with his wife, but he denied pointing it at her, insisting that she could not have seen it. Tr. 5:242-43.

2. The State of Washington charged the defendant by amended information with assault in the second degree, interfering with domestic violence reporting, and malicious mischief in the third degree. J.A. 3-4. The crime of second degree assault has six alternative means of committing the

crime, but the State of Washington alleged only one: that the assault was committed "with a deadly weapon." J.A. 3 (citing Wash. Rev. Code § 9A.36.021). The definition of "deadly weapon" under this statute includes a firearm. Wash. Rev. Code § 9A.04.110(6).

The State of Washington also charged a sentencing enhancement—that at the time of the crime the defendant was "armed with a deadly weapon, to wit: a handgun." J.A. 3. Under Washington law, a deadly weapon for purposes of a sentencing enhancement was defined as "any dirk, dagger, pistol, revolver, *or any other firearm* . . . ." Former Wash. Rev. Code § 9.94A.125 (emphasis added). A three-year sentence enhancement applied if the offender or an accomplice was armed with a firearm, Former Wash. Rev. Code § 9.94A.310(3)(b), whereas a one-year enhancement applied if the offender was armed with a deadly weapon "other than a firearm." Former Wash. Rev. Code § 9.94A.310(4)(b).[2]

3. At trial, the defendant testified that he damaged the stovetop with a kettle because he was angry that his wife would not cook dinner. Tr. 7:634. He testified that his wife began to call the police after he damaged the stove, and that he attempted to take the phone from her. Tr. 7:639-40. He claimed that, in reaching for the receiver, he unintentionally grabbed the cord, accidentally pulling it from the wall. Tr. 7:640. He admitted that the gun was in his hand that night, but he denied that he pointed it at his wife. Tr. 8:709, 725-27.

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[2] The increased penalty when the "deadly weapon" is a firearm was the product of an initiative passed by the citizens of Washington and approved by the Legislature. 1995 Washington Laws, ch. 129. One of the stated purposes of this enhancement was to "[d]istinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms." 1995 Washington Laws, ch. 129, § 1.

Throughout the trial, there was no dispute that the only weapon involved was the firearm. Pet. App. 18a. After the evidence was received, the court and counsel discussed jury instructions, including how to define the term "deadly weapon" for purposes of the elements instruction on the charge of second degree assault, as well as for purposes of the sentence enhancement. The trial court observed: "Counsel, quite frankly there is no dispute in this case that we are talking about a gun . . . ." J.A. 16. Defense counsel did not disagree; instead, he argued that the definition of "deadly weapon" should include the *manner* in which the firearm was used. J.A. 17-20. The court noted counsel's objection to the definition of the term "firearm," but ruled that " . . . if the only weapon involved is a firearm . . . the simplified definition of deadly weapon should be used . . . And indeed the Court is giving only the more simplified version, since no other weapons are the subject of this trial other than a firearm." J.A. 25.

For the crime of second degree assault, the Court instructed the jury that "[t]he term 'deadly weapon' includes any firearm, whether loaded or not." J.A. 7. With respect to the "deadly weapon" special verdict instruction, the court instructed that "[a] pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." J.A. 8. The Court also adopted defense counsel's proposed special verdict form, which provided:

> We, the jury, return a special verdict by answering as follows: Was the defendant, ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree? ANSWER: _____ (Yes or No).

J.A. 13. In closing arguments, the prosecutor and defense counsel repeatedly referred to the firearm as the only weapon at issue in the assault charge. See, e.g., Tr. 9:838 (defense).

A jury convicted the defendant on all charged counts and returned a special verdict finding that he had committed the assault while armed with a deadly weapon. J.A. 10-13. Although defense counsel acknowledged that ". . . the allegation and the basis on which this case was tried was under the theory of firearm. . . ," J.A. 30, and that "the firearm is a[n] element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury," J.A. 37, he argued that the court should only apply the one-year sentencing enhancement for deadly weapons other than firearms. J.A. 43. The trial court rejected this argument and sentenced Recuenco using the three-year enhancement based on the court's finding that the defendant had unquestionably been armed with a firearm.[3] J.A. 47.

4. The defendant appealed, arguing *inter alia*, that the trial court erred by imposing a three-year firearm enhancement when the jury had been asked to make only a general "deadly weapon" finding. His appeal was rejected by the Washington Court of Appeals, which found that any error in the special verdict form was harmless beyond a reasonable doubt. Pet. App. 17a-19a. The Court of Appeals observed:

> . . . The only weapon mentioned or charged in connection with the assault here was a firearm. The information specified that the deadly weapon Recuenco used in the

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[3] The trial court's decision to apply the three-year enhancement was consistent with Washington law. The "deadly weapon" enhancement statute provided that a defendant had the right to have a jury find whether he was armed with a deadly weapon, but did not expressly require that the jury find the exact type of deadly weapon involved. Former Wash. Rev. Code § 9.94A.125. At the time of Recuenco's trial, Washington courts had held that it was permissible for a trial court to make the finding that the deadly weapon was a firearm at sentencing when determining the length of the sentencing enhancement. *State v. Meggyesy*, 90 Wash. App. 693, 707-09, 958 P.2d 319, *review denied*, 136 Wash.2d 1028, 972 P.2d 465 (1998), *abrogated by State v. Recuenco*, 154 Wash.2d 156, 110 P.3d 188 (2005).

> assault was a handgun, a firearm. The prosecution argued to the jury that Recuenco committed the assault with a firearm. Jury instructions specified that a firearm constituted a deadly weapon. The jury then specifically found that Recuenco had committed the assault using a deadly weapon. No other weapon was mentioned. Any constitutional error was harmless because it is clear beyond a reasonable doubt that the jury's verdict was not affected by the error.

Pet. App. 18a -19a.

The Washington Supreme Court reversed the Court of Appeals and vacated the sentence. The court held that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), an error in permitting a judge to make a decision reserved for the jury is per se reversible. The Washington Supreme Court's decision on this issue in *State v. Recuenco* was short, see Pet. App. 8a, because the court's reasoning was explained in *State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), decided the same day. See Pet. App. 20a-27a. The holdings in *Hughes* and *Recuenco* were based upon language in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Hughes*, 154 Wash. 2d at 144. The Washington Supreme Court held that if a judge decides a sentencing enhancement factual issue reserved for the jury, the error is "structural" and, thus, always reversible, regardless of whether it can be said beyond a reasonable doubt that the instructional error did not deprive the defendant of a fair trial. *Id.* The court did not reject *Neder v. United States*, 527 U.S. 1 (1999). Rather, the court held that harmless error analysis was possible as to erroneous elements, but not sentencing enhancements. *Id.* at 148 n.12.

The State of Washington timely petitioned this Court for a writ of certiorari, and that petition was granted on October 17, 2005.

SUMMARY OF THE ARGUMENT

1. This Court has consistently recognized that criminal convictions should be affirmed where the errors at trial, constitutional or otherwise, clearly did not affect the jury's verdict. *Chapman v. California*, 386 U.S. 18 (1967). Harmless error analysis promotes fundamental fairness in criminal proceedings by helping to ensure that criminal cases are decided on the merits and not on the basis of defects that have no bearing on guilt or innocence. This Court has held unequivocally that jury instructions which omit or misdefine a single element of a criminal offense can be harmless error. *Neder v. United States*, 527 U.S. 1 (1999). Applying the same reasoning, this Court also has held that instructional error as to a death penalty aggravator is subject to harmless error analysis even when the aggravator has not been expressly alleged or proven. *Mitchell v. Esparza*, 540 U.S. 12 (2003). These decisions are well-supported by the history of harmless error analysis, by this Court's numerous harmless error decisions, and by concerns that needless retrials neither protect constitutional rights nor engender respect for the judicial system.

The Washington Supreme Court held that, although an erroneous jury instruction omitting an element of the crime is subject to harmless error review, the same error with respect to a sentencing enhancement is not subject to harmless error review. This decision conflicts with *Neder* and *Esparza*, which illustrate that, for purposes of determining whether harmless error is available, there is no material difference between elements of the offense and sentencing enhancements. Imprecise instructions or verdict forms relating to a sentencing enhancement are subject to the same harmless error analysis that applies to errors setting forth the elements

of the crime; there is no reason for a more restrictive appellate review as to aggravating sentencing factors. Thus, *Neder* and *Esparza* clearly established the principle that harmless error analysis is appropriate as to an incomplete jury verdict, regardless of whether the gap in the verdict was caused by error in an element or a sentencing enhancement instruction. This case calls for a simple application of *Neder* and *Esparza*.

2. The Washington Supreme Court also erred by relying on a thread of reasoning from *Sullivan v. Louisiana*, 508 U.S. 275 (1993) to hold that structural error occurs whenever a judge decides any sentencing fact that should have been decided by a jury, and that such error can never be harmless. Structural errors are rare, and are categorically distinct from other constitutional errors. Such errors occur only where a defect affects the entire framework within which the trial proceeds, rather than simply an error in the trial process itself. Structural errors are inscrutable, unquantifiable, and indeterminate, and must necessarily render a trial fundamentally unfair. An error in a sentencing enhancement instruction which leads to a single gap in a jury's verdict is not within the narrow category of structural errors, because it does not infect the entire framework of the trial nor necessarily render the trial fundamentally unfair. The error here is identical to the errors in *Neder* and *Esparza*—errors that admittedly resulted in a verdict that did not encompass a single element or sentencing factor, but where it is still possible to determine beyond a reasonable doubt that the error did not affect the verdict.

3. Finally, there is no reason to question the soundness or the fairness of the constitutional harmless error rule established in *Chapman*, and applied in *Neder* and *Esparza*. The harmless beyond-a-reasonable-doubt standard is demanding, and requires the appellate court to reverse a conviction unless it can be established beyond a reasonable doubt—the highest burden of proof—that the error did not affect the verdict. The

rule permits a court to affirm the conviction where the inaccurate jury instructions did not truly deprive the defendant of a fair trial. A rule that precludes harmless error analysis of such errors would result in numerous retrials or bars to prosecution where the defendant's guilt is not in question. Moreover, such a rule would affect state court jury verdicts more frequently than federal jury verdicts because states like Washington do not routinely preclude appellate review of errors in jury instructions, even when there is no objection at trial.

The jury in this case found that the defendant was armed with a deadly weapon when he assaulted his wife. The only weapon alleged, argued, or supported by the testimony was a firearm, and the term "deadly weapon" was defined in the instructions as "any firearm." Recuenco even admitted to possessing the firearm. Since this case was tried before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), neither the trial court nor the prosecutor realized that the judge's finding that Recuenco was armed with a firearm infringed on his Sixth Amendment right to trial by jury. Given the undisputed fact that a firearm was the only deadly weapon alleged, the trial court properly imposed the three-year firearm enhancement as required by law. The error in the jury instructions was harmless beyond a reasonable doubt.

ARGUMENT

The Washington Supreme Court's decision in this case is erroneous because it creates two rules for evaluating the effect of trial error: one rule that permits harmless error review of jury instructions with faulty or missing elements, and a second rule that requires automatic reversal for jury instructions that erroneously define a sentencing enhancement. Sentencing enhancements are functionally equivalent to elements under the Sixth Amendment's right to jury trial, so there is no basis for two different standards.

The Washington Supreme Court's error stemmed from two related mistakes. First, the Washington Supreme Court failed to recognize that this Court has authorized harmless error review of incomplete verdicts, regardless of whether the incomplete verdict was caused by the erroneous definition of an element or a sentencing enhancement. Thus, the Washington Supreme Court's decision conflicts with, at a minimum, this Court's decisions in *Neder v. United States*, 527 U.S. 1 (1999) and *Mitchell v. Esparza*, 540 U.S. 12 (2003).

Second, the Washington Supreme Court failed to recognize that its "structural error" holding rested on language in *Sullivan v. Louisiana* that has been expressly disavowed by this Court. The error here was not structural.

I. BECAUSE SENTENCING ENHANCEMENTS ARE THE FUNCTIONAL EQUIVALENT OF ELEMENTS OF THE OFFENSE, ERRONEOUS JURY INSTRUCTIONS ON ENHANCEMENTS ARE SUBJECT TO THE SAME *CHAPMAN/ NEDER* HARMLESS ERROR REVIEW THAT APPLIES TO FLAWED INSTRUCTIONS ON ELEMENTS.

The practice of reviewing error in order to determine whether it was harmless has roots in English jurisprudence of the 19th century. R. Traynor, *The Riddle of Harmless Error* 4-13 (1970) (hereinafter "*Harmless Error*"); 5 W. LaFave et al., *Criminal Procedure* § 27.6(a), at 933 (2nd ed. 1999). American courts were somewhat slow to adopt the concept and ultimately came under heavy and protracted criticism for reversing convictions based upon seemingly insignificant errors. Traynor, *Harmless Error*, *supra*, at 13-14; 5 LaFave et al. *supra*, § 27.6(a), at 933-34. Eventually, "out of widespread and deep conviction over the general course of appellate review in American criminal causes[,]" both the federal government and each state adopted some form of statutory harmless-error rule by the mid-1960s. *Chapman v.*

California, 386 U.S. 18, 22 (1967); *Kotteakos v. United States*, 328 U.S. 750, 759 (1946); Traynor, *Harmless Error*, *supra*, at 13-14.

In the 1960s, as this Court expanded the reach of the federal constitution into state criminal processes, the Court had increasing occasion to address harmless error in the context of constitutional error. In *Chapman*, the Court held that a federal constitutional error could be harmless, provided an appellate court could "declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24.[4]

Over the past four decades, this Court has found a wide variety of constitutional errors subject to harmless error analysis. *See, e.g.*, *California v. Roy*, 519 U.S. 2, 4-6 (1996) (error in jury instructions defining element of crime); *Yates v. Evatt*, 500 U.S. 391, 402-06 (1991) (unconstitutional burden-shifting malice instruction); *Clemons v. Mississippi*, 494 U.S. 738, 752-54 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Satterwhite v. Texas*, 486 U.S. 249, 257-58 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570, 579 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the

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[4] The *Chapman* case is an example of how the expanding reach of the federal constitution into the state criminal process speeded the development of harmless error jurisprudence. In *Chapman*, the error at issue, an instruction and comment on the defendant's failure to testify, was authorized under the California constitution and had only recently been recognized as federal constitutional error. *See Griffin v. California*, 380 U.S. 609 (1965).

circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (failure to permit cross-examination concerning witness bias); *Rushen v. Spain*, 464 U.S. 114, 117-20 (1983) (denial of right to be present at critical stage of proceedings); *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) (improper comment on defendant's failure to testify); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); *Brown v. United States*, 411 U.S. 223, 231-32 (1973) (admission of the out-of-court statement of a non-testifying codefendant in violation of the Sixth Amendment Counsel Clause); *Milton v. Wainwright*, 407 U.S. 371, 372-78 (1972) (admission of confession obtained in violation of right to counsel); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Confrontation Clause); *Harrington v. California*, 395 U.S. 250, 252-54 (1969) (denial of Sixth Amendment right to confront witnesses); *Chapman*, 386 U.S. at 24-25 (comment on the right against self-incrimination).

The Court has recognized that "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule." *Rose*, 478 U.S. at 578. In *Rose*, this Court reversed a lower court's refusal to engage in harmless error analysis, and explained why harmless error analysis was entirely consistent with the constitutional protections found to have been violated in such cases.

> The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

478 U.S. at 579.

Likewise, in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court considered a decision by the Delaware Supreme Court, which had adopted a per se rule prohibiting harmless error analysis as to a Confrontation Clause error. The Court found that the error was susceptible to review for harmlessness, and reversed the per se approach taken by the Delaware court. *Van Arsdall*, 475 U.S. at 682.

A few years later, this Court reaffirmed its view that the fundamental purpose of a criminal trial is to determine the guilt or innocence of the accused, that harmless error analysis is consistent with this core notion of fairness, and that the rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Van Arsdall*, 475 U.S. at 681). Harmless error analysis is possible because the impact of discrete errors can be assessed in the context of a fully-developed record. "The common thread connecting [harmless error] cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08. "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless error analysis." *Neder*, 527 U.S. at 8 (quoting *Rose*, 478 U.S. at 579).

In sum, these decisions recognize that, in the absence of a constitutional provision mandating a precise remedy for constitutional violations, the Court's role is to fashion a remedy that protects constitutional rights but that does not burden courts with unnecessary retrials when the right was not meaningfully impinged. The harmless error doctrine promotes fundamental fairness in criminal proceedings by helping to

ensure that criminal cases are decided on the merits, and not on the basis of defects that have no bearing on the jury's verdict. *State v. Allen*, 359 N.C. 425, 454-55, 615 S.E.2d 256 (2005) (Martin, J., dissenting). The doctrine ensures public confidence in the criminal justice system by reducing the risk that guilty defendants may go free. *Johnson v. United States*, 520 U.S. 461, 470 (1997) (quoting Traynor, *Harmless Error*, *supra*, at 50: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."). The harmless error doctrine thereby conserves judicial resources by preventing costly, time-consuming and unnecessary remands, and thus promotes the constitutional right to a "speedy trial" by reducing the number of cases on trial court dockets. *Allen*, 359 N.C. at 454 (Martin, J. dissenting) (citing *Chapman*, 386 U.S. at 22, and Traynor, *Harmless Error*, *supra*, at 14, 51). And, finally, the doctrine promotes stability and predictability in the law because appellate judges will be less likely to bend, stretch, or adapt the law in order to avoid a clearly unwarranted reversal. *Id.* at 455.

The history, decisions and policies described above were reaffirmed in *Neder v. United States*, wherein this Court applied harmless error analysis to the failure to obtain a jury finding on an element of the offense. Neder had operated several fraudulent real estate schemes funded by illegally obtained bank transactions through which he gained over $40 million. He failed to report at least $5 million on his income tax returns. He was charged with mail fraud, wire fraud, bank fraud, and two counts of filing false income tax returns. *Neder*, 527 U.S. at 5-6. In accord with the prevailing law at the time, but over Neder's objection, the trial judge decided the issue of "materiality," an element of the tax charge, and instructed the jury that it need not consider materiality. *Id.* at 6. Neder was convicted, and he appealed.

In *United States v. Gaudin*, 515 U.S. 506 (1995), this Court had held that "materiality" was an element of a similar crime, and must be submitted to the jury. In *Neder*, the Court applied *Gaudin* to the tax charge brought against Neder, and held that the materiality of Neder's tax omissions should have been decided by the jury. *Neder*, 527 U.S. at 25.

The Court also held that failure of a jury to pass on this element of the offense was subject to harmless error analysis. This holding was rooted in harmless error cases where an "erroneous instruction [that] preclude[d] the jury from making a finding on the *actual* element of the offense" had led to an incomplete verdict. *Neder*, 527 U.S. at 10 (italics in original). Sometimes the error had been a misdescription of an element, *see Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of "value" element in pornography prosecution), sometimes it had been the omission of an element, *see Johnson v. United States*, 520 U.S. 461 (1997); *California v. Roy*, 519 U.S. 2 (1996), and sometimes it had been the use of a conclusive presumption. *See Yates v. Evatt*, 500 U.S. 391 (1991) (presumption of malice from intentional criminal act); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable malice presumption). In each situation the jury's verdict was defective, and incomplete, in the sense that there existed a gap between what was found and what the law required. For instance, a conclusive presumption "deters the jury from considering any evidence other than that related to the predicate facts . . . and 'directly foreclose[s] independent jury consideration of whether the facts proved established certain elements of the offens[e].'" *Neder*, 527 U.S. at 10 (quoting *Carella*, 491 U.S. at 266 (Scalia, J., concurring in judgment)). Although each of these cases involved an incomplete verdict, the Court found the error harmless.

Applying the same reasoning to *Neder*, the Court found that the evidence of "materiality" was overwhelming and

uncontroverted, and that the error which caused the incomplete verdict was therefore harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 16-17.

In 2003, this Court revisited the issue of harmless error analysis in the context of a challenge to aggravating factors that authorized a death sentence, and reversed the grant of a federal habeas corpus petition because the Sixth Circuit had erroneously interpreted this Court's cases as precluding harmless error analysis. *See Mitchell v. Esparza*, 540 U.S. 12 (2003). Esparza killed a store clerk in a robbery by shooting her once in the neck. He was charged with and convicted of capital murder. On post-conviction review, Esparza alleged, citing the Eighth Amendment, *Apprendi v. New Jersey*, and *Sullivan v. Louisiana*, that the death penalty could not be imposed because the state had not alleged the aggravating factor—that Esparza was the "principal offender"—and hence the jury had never found this factor. *Mitchell v. Esparza*, 540 U.S. at 15; *see also Esparza v. Mitchell*, 310 F.3d 414, 418-20 (6th Cir. 2002).[5]

This Court reversed in a per curiam opinion, reaffirming its previous harmless error holdings:

> According to the Sixth Circuit, Ohio's failure to charge in the indictment that respondent was a "principal" was the functional equivalent of "dispensing with the reasonable doubt requirement" 310 F.3d, at 421 (citing *Sullivan v. Louisiana, supra*, at 280). Our precedents, however, do not support its conclusion. In noncapital cases, we have often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is

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[5] The issues in *Esparza* were not simply Eighth Amendment-based. The Sixth Circuit Court of Appeals' decision was based on the conclusion that permitting an appellate judge to find an aggravating fact that was neither alleged nor proved would be akin to dispensing with the reasonable doubt requirement, as forbidden in *Sullivan*. *Esparza v. Mitchell*, 310 F.3d at 421, 431 n.4 (Suhrheinrich, J. dissenting).

> subject to harmless-error analysis. *E.g.*, *Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1996) *(per curiam); Carella v. California*, 491 U.S. 263 (1989) *(per curiam); Pope v. Illinois*, 481 U.S. 497 (1987).

Mitchell v. Esparza, 540 U.S. at 16. As in *Neder*, the Court distinguished *Sullivan* on the basis that the error in *Sullivan* vitiated all the jury's findings, not just a single finding. *Id.* Accordingly, this Court held that the lower federal courts had exceeded their authority to review state court interpretations of Supreme Court precedent under 28 U.S.C. § 2254(d)(1). *Id.* at 18.

Thus, *Neder* and *Esparza*, as well as the precedents upon which those cases were decided, illustrate that instructional errors as to elements *and* sentencing factors are both subject to harmless error analysis when they result in an incomplete verdict. This case does not present the issue of whether to extend *Neder* or apply it to a slightly different context; it merely involves an application of the *Neder* and *Esparza* rules.

The Washington Supreme Court believed, however, that although harmless error analysis was permissible for incomplete verdicts caused by faulty elements instructions, harmless error analysis was not permissible for incomplete verdicts caused by an erroneous sentencing factor instruction. *See Hughes*, 154 Wash.2d at 148 n.12.[6] This holding is incorrect.

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[6] Washington has long applied harmless error analysis to jury instructions that misdefine or omit an element of the offense. *See State v. Brown*, 147 Wash.2d 330, 340, 58 P.3d 889 (2002) (adopting *Neder* because it was consistent with Washington law), and *State v. Courtemarch*, 11 Wash. 446, 39 P. 955 (1895) (improper presumption instruction). Similarly, Washington has a history of applying harmless error review to sentencing enhancement errors. *See State v. Belmarez*, 101 Wash.2d 212, 216, 676 P.2d 492 (1984) (erroneous conclusive presumption in deadly weapon instruction); *In re Taylor*, 95 Wash.2d 940, 944,

The constitutional error that occurred in this case was the failure to submit a fact concerning the sentencing enhancement to the jury. In a number of recent cases, this Court has repeatedly held that, pursuant to the Sixth Amendment, any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Blakely*, 542 U.S. at 301; *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002); *Apprendi*, 530 U.S. at 490. These decisions were based upon the Court's understanding that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted). For Sixth Amendment purposes, sentencing enhancements that impose punishment above that authorized by the jury's verdict are the "functional equivalent" of elements of an offense. *Id.* at 494 n.19.

Accordingly, there is no basis for distinguishing between elements and sentencing enhancements when determining whether harmless error applies. In each situation, the question for harmless error analysis is the same—does the error in the element or the enhancement, resulting in a less-than-complete verdict on a single element or enhancement, require automatic reversal? The answer, as established by *Neder* and *Esparza*, is "no." Where the jury failed to make an express finding on a single element or enhancement, that failure can be harmless in some circumstances. A single rule of appel-

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632 P.2d 56 (1981) (failure to instruct jury that it needed to find firearm enhancement beyond a reasonable doubt); *State v. Hall*, 95 Wash.2d 536, 541, 627 P.2d 101 (1981) (same); *State v. Mode*, 57 Wash.2d 829, 360 P.2d 159 (1961) (failure to submit special interrogatory concerning age of victim); *State v. Cook*, 69 Wash. App. 412, 418, 848 P.2d 1325 (1993) (error in defining "deadly weapon").

late review should apply to faulty instructions on elements and sentencing enhancements.

In this case, the Washington Supreme Court departed from this Court's clear precedent, as well as its own history of applying harmless error review. Although it believed its holding was compelled by this Court's decisions, that conclusion was erroneous, and should be reversed. The error that occurred in Recuenco's trial is no different, and certainly no more egregious, than the errors in *Mitchell v. Esparza*, *Neder v. United States*, *Pope v. Illinois*, *California v. Roy*, *Carella v. California*, *Yates v. Evatt*, or *Rose v. Clark*. The error here is subject to the same harmless error review that applied in those cases.

II. THE WASHINGTON SUPREME COURT ERRONEOUSLY RELIED ON *SULLIVAN V. LOUISIANA* TO CONCLUDE THAT STRUCTURAL ERROR OCCURS WHENEVER A JUDGE DECIDES A SENTENCING ENHANCEMENT RESERVED FOR A JURY.

The Washington Supreme Court also held that the trial court's failure to ask the jury to find whether the deadly weapon was a firearm constituted "structural error" and thus was not subject to any harmless error analysis. Pet. App. 8a, 23a-27a. As did the Sixth Circuit in *Esparza*, *supra*, the state supreme court here believed that this holding was compelled by *Apprendi v. New Jersey* and *Sullivan v. Louisiana*. The court was incorrect—an error in defining a sentencing enhancement is not structural.

A few types of error, affecting "a very limited class of cases," are not subject to *Chapman* harmless error analysis. *Johnson v. United States*, 520 U.S. 461, 468 (1997). These "structural" errors are almost always reversible error because they "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial

process itself." *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 310). Such errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), so as to "necessarily render a trial fundamentally unfair." *Rose*, 478 U.S. at 577.

Errors that fit within this limited category include trials wherein there was a complete denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); racial discrimination in selection of a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); denial of self-representation, *McKaskle v. Wiggins*, 465 U.S. 168 (1984); denial of public trial, *Waller v. Georgia*, 467 U.S. 39 (1984); and the use of a defective reasonable-doubt jury instruction. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Each of these errors is "unquantifiable and indeterminate" such that an appellate court could never discern whether the error did not prejudice the defendant. *Sullivan*, 508 U.S. at 282. If an appellate court cannot make such a determination, then the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310 (quoting *Rose*, 478 U.S. at 577-78) (citation omitted). Structural error has traditionally been a categorical determination based on the nature or the character of the error itself, rather than a case-by-case examination of a particular jury's decision. *Neder*, 527 U.S. at 14.

In *Sullivan v. Louisiana*, the Court concluded that a faulty reasonable doubt instruction was not subject to harmless error analysis because it "vitiates *all* the jury's findings," 508 U.S. at 281, and produces "consequences that are necessarily unquantifiable and indeterminate." *Id.* at 282. An alternative thread of reasoning in *Sullivan* suggested a more restrictive approach to harmless error analysis than had been taken in past cases. Under that reasoning, where there is the absence of an actual verdict of guilty-beyond-a-reasonable-

doubt, "the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object,* so to speak, upon which the harmless-error scrutiny can operate." *Id.* at 280 (italics in original).

Relying on this language, the Washington Supreme Court held that replacing a jury finding with a judge finding was "structural" error which could never be harmless.

> . . . It would be illogical to perform harmless error analysis on the absence of those findings. There is no object upon which to apply harmless error analysis. Instead of asking whether but for the error the findings *would have been the same,* the court would be asking whether but for the error the findings *would have been different.* Such an analysis is the equivalent of speculating on the jury's verdict, which the Supreme Court has held is never allowed.

Pet. App. 23a (internal citations omitted—emphasis in original).

This holding that *Sullivan* bars harmless error review of erroneous sentencing enhancement jury instructions is flawed for a number of reasons. As discussed in the preceding section, this approach cannot be reconciled with *Esparza*, *Neder*, or the precedents on which those cases were built. It is also at odds with this Court's plain error decisions, wherein this Court has noted that judicial findings do not irreparably taint a criminal trial.

First, the broad language in *Sullivan* was expressly disavowed in *Neder*. *See Neder*, 527 U.S. at 11-12 ("Although this strand of the reasoning in *Sullivan* does provide support for Neder's position, it cannot be squared with our harmless-error cases"); *id.* at 13 ("We believe this approach is mistaken for more than one reason."). The Court observed that an extension of the reasoning of *Sullivan* to cases involving jury instructions with a missing element would conflict with the Court's prior decisions, and result in an undesirable rule, even

if such an extension would not be illogical. In short, the Court concluded that ". . . if the life of the law has not been logic but experience, see O. Holmes, The Common Law 1 (1881), we are entitled to stand back and see what would be accomplished by such an extension in this case." *Id.* at 15. Because a retrial would not focus on the omitted issue of materiality, but instead would require re-litigation of issues upon which the jury was properly instructed, the Court concluded that "the Sixth Amendment [does not] require . . . us to veer away from settled precedent to reach such a result." *Id.*; *see also Esparza*, 540 U.S. at 16-18.

Second, this Court has repeatedly rejected appeals based on plain error analysis even where elements or sentencing factors were omitted. Plain error analysis requires a party to show (1) error, (2) that is plain, and (3) that affects substantial rights. If all three steps are met, the Court decides whether to exercise discretion to review the question, considering whether (4) failure to note the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See* Fed. R. of Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725 (1993); *Johnson v. United States,* 520 U.S. 461, 466-67 (1997) (conviction affirmed in spite of judicial finding on element of "materiality" where defendant failed to object); *United States v. Cotton*, 535 U.S. 625 (2002) (aggravated sentence based on judicial finding of drug amount affirmed where no objection was lodged to judicial finding). In *Johnson* and *Cotton*, this Court refused to grant relief to a defendant who failed to object to a judicial finding on an element (*Johnson*) or a sentencing enhancement (*Cotton*) because "even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 632-33.

Although plain error analysis is distinct from constitutional harmless error analysis, in *Neder*, this Court found "instruc-

tive" its earlier decision in *Johnson* that a similar error was not plain. *Neder*, 527 U.S. at 9. The Court recognized that the fact that the error was not plain "cuts against the argument that the omission of an element will *always* render a trial unfair." *Id.* (emphasis in original). Thus, this Court's plain-error cases are consistent with the view that error in permitting a judge, rather than a jury, to decide a single element or sentencing enhancement, is fundamentally different from those errors this Court has deemed "structural."

For these reasons, this Court should reverse the Washington Supreme Court's holding that structural error occurs whenever a trial court errs in instructing a jury on a sentencing enhancement.

III. *CHAPMAN/NEDER* HARMLESS ERROR ANALYSIS IS FAIRLY APPLIED BY BOTH FEDERAL AND STATE APPELLATE COURTS; A DIFFERENT RULE WOULD NOT FURTHER JUSTICE AND COULD DISPROPORTIONATELY AFFECT STATE CONVICTIONS.

As argued above, the *Chapman / Neder* harmless error test strikes an appropriate balance between competing interests, such that constitutional rights are protected without reversing every imperfect trial. Although nearly every state and federal appellate court has determined that harmless error analysis is appropriate where a judge has decided an issue that should have been decided by the jury, see Pet. 10-15; *State v. Allen*, 359 N.C. at 467 n.13 and 468 n.15 (Martin J., dissenting) (collecting state and federal cases as of July 1, 2005), there is no evidence that these rulings have diminished the jury trial right. In fact, not surprisingly, many courts have reversed jury verdicts under the stringent *Chapman* standard of review, because it could not be said that the error was harmless beyond a reasonable doubt. *See United States v. Casas*, 425 F.3d 23, 59-61 (1st Cir. 2005) (finding that *Blakely* error in

enhancing sentence based upon judicial finding of drug quantity was not harmless beyond a reasonable doubt); *United States v. Olis*, No. 04-20322, 2005 WL 2842077 (5th Cir. filed Oct. 31, 2005) (holding that *Blakely* error was not harmless beyond a reasonable doubt); *United States v. Meyer*, 427 F.3d 558, 560-61 (8th Cir. 2005) (finding that *Booker* error in setting amount of fine was not harmless beyond a reasonable doubt); *United States v. Small*, 423 F.3d 1164, 1190-91 (10th Cir. 2005) (holding that judicial finding of drug quantity at sentencing was not harmless beyond a reasonable doubt). These cases illustrate that appellate courts well understand the limited circumstances under which constitutional error can truly be harmless, and faithfully apply that standard. A rule of automatic reversal is not required.

It should also be noted that the effect of an automatic reversal rule in these circumstances would be significant, and is likely to be greater on state courts than on federal courts because many state courts, including Washington, do not apply the federal plain error rule. In *Neder*, the dissenting justices suggested that the Court was overly concerned that an automatic reversal rule would "invalidate convictions in innumerable cases where the defendant is obviously guilty," and insisted that "there is simply no basis for this concern" because most errors would not have been preserved, and thus would be rejected pursuant to the federal plain error analysis. *Neder*, 527 U.S. at 39 (Scalia, J., dissenting).

But Washington courts employ a considerably more liberal scope of review that permits constitutional errors in jury instructions to be raised for the first time on review. *See, e.g.*, *State v. Mills*, 154 Wash.2d 1, 6, 109 P.3d 415 (2005) (holding that the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal).

Thus, under *Recuenco*, a defendant in Washington whose jury was improperly instructed as to a sentencing enhance-

ment can remain silent at trial, yet obtain automatic reversal on appeal, no matter how insignificant the error. To the extent that this Court's decision on the application of the harmless error test is influenced by the potential impact of that test, we respectfully urge this Court not to adopt a test that will have greater repercussions on the state courts than on the federal courts.

Finally, although the jury instructions and the verdict form in this case should have been drafted to ensure an express jury verdict that Recuenco was armed with a firearm, the error clearly did not deprive Recuenco of a fair trial. Even defense counsel said after trial, "the firearm is a[n] element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury." J.A. 37. Likewise, the trial court observed that, ". . . no other weapons [we]re the subject of this trial other than a firearm." J.A. 25. Under these circumstances, it is clear that the error in drafting these instructions did not affect the verdict on the enhancement, and that the error was harmless beyond a reasonable doubt.

CONCLUSION

The decision of the Washington State Supreme Court should be reversed, and the case should be remanded for a determination of whether the error was harmless, and for consideration of other issues properly presented by Recuenco's appeal.

Respectfully submitted,

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King County Prosecuting Attorney

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Senior Deputy Prosecuting Attorney

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Supreme Court, U.S.
FILED
DEC 14 2005
OFFICE OF THE CLERK

No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

JOINT APPENDIX

NORM MALENG
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PETITION FOR WRIT OF CERTIORARI FILED JULY 13, 2005
CERTIORARI GRANTED OCTOBER 17, 2005

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 99-1-07833-7 SEA

STATE OF WASHINGTON,
Plaintiff,

v.

ARTURO R. RECUENCO,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/22/99	Original Information filed
12/23/99	Second Amended Information filed
1/10/00	Jury trial commenced
1/18/00	Third Amended Information filed
1/25/00	Court's instructions to the jury and verdict of jury finding defendant guilty as charged
2/24/00	Judgment and sentence of the court
2/29/00	Defendant's notice of appeal filed
7/28/03	Opinion of the Court of Appeals of Washington
4/14/05	Opinion of the Supreme Court of Washington

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 99-1-07833-7 SEA

THE STATE OF WASHINGTON,
Plaintiff,

v.

ARTURO R. RECUENCO,
Defendant.

INFORMATION

Filed September 22, 1999

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ARTURO R. RECUENCO of the crime of **Assault in the Second Degree**, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did intentionally assault Amy Recuenco with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: //s//
Kristin J. Chandler, WSBA #22684
Deputy Prosecuting Attorney

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

THIRD AMENDED INFORMATION

Filed January 18, 2000

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ARTURO R. RECUENCO of the crime of **Assault in the Second Degree**, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did intentionally assault Amy Recuenco with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant ARTURO R. RECUENCO at said time of being armed with a deadly weapon, to-wit: a handgun, under the authority of RCW 9.94A.125 and 9.94A.310.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse ARTURO R. RECUENCO of the crime of **Interfering with Domestic Violence Reporting**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Amy Recuenco, the victim of that crime and a witness to that crime, from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official;

Contrary to RCW 9A.36.150, and against the peace and dignity of the State of Washington.

COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse ARTURO R. RECUENCO of the crime of **Malicious Mischief in the Third Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did knowingly and maliciously cause physical damage to a kitchen stove, the property of Amy Recuenco;

Contrary to RCW 9A.48.090, and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: _____//s//_____
Jared C. Kimball, WSBA #25999
Deputy Prosecuting Attorney

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

STATE'S TRIAL MEMORANDUM

Filed January 10, 2000

I. CHARGE

The defendant is charged with one count of Assault in the Second Degree-Domestic Violence, with a Deadly Weapon Enhancement (handgun), one count of Interfering with Domestic Violence Reporting, and one count of Malicious Mischief in the Third Degree.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY
[Captions Omitted In Printing]

DEFENDANT'S PROPOSED JURY INSTRUCTIONS
(WITH CITATIONS)

Filed January 12, 2000

* * *

INSTRUCTION NO.

You will also be furnished with a special verdict form. If you find the defendant not guilty of Assault in the Second Degree do not use the special verdict form. If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

* * *

SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

Was the ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?

ANSWER: _____ (Yes or No)

_____
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

COURT'S INSTRUCTIONS TO THE JURY

Filed January 25, 2000

* * *

No. 8

To convict the defendant of the crime of assault in the second degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th of September, 1999, the defendant intentionally assaulted Amy Recuenco with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty as to Count I.

* * *

No. 9

The term "deadly weapon" includes any firearm, whether loaded or not.

* * *

No. 18

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree as alleged in Count I.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

No. 19

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and verdict forms.

You must fill in the blank provided in the verdict forms the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 20

You will also be furnished with a special verdict form. If you find the defendant not guilty of Assault in the Second Degree do not use the special verdict form. If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form and fill in the blank with the

answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM A

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUENCO [Guilty] (write in Not Guilty or Guilty) of the crime of Assault in the Second Degree as charged in Count I.

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM B

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUENCO [Guilty] (write in Not Guilty or Guilty) of the crime of interfering with Domestic Violence Reporting as charged in Count II.

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM C

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUENCO [Guilty] (write in Not Guilty or Guilty) of the crime of Malicious Mischief in the Third Degree as charged in Count III.

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

SPECIAL VERDICT FORM

Filed January 25, 2000

We, the jury, return a special verdict by answering as follows:

Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?

ANSWER: [YES] (Yes or No)

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

JUDGMENT AND SENTENCE (Count I)

Filed March 2, 2000

I. HEARING

1.1 The defendant, the defendant's lawyer, Richard Pope, and the deputy prosecuting attorney were present at the sentencing hearing conducted today.

* * *

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on (date): 01-25-2000 by jury verdict of:

Count No.: 1 Crime: ASSAULT IN THE 2ND DEGREE
RCW 9A.36.021 1 C Crime Code: 01021
(a) Date of Crime: 09-18-1999 Incident No. ____.

* * *

SPECIAL VERDICT or FINDING(S):

(b) [ ] A special verdict/finding for being armed with a **Firearm** was rendered on Count(s) _____.
(c) [X] A special verdict/finding for being armed with a **Deadly Weapon** other than a firearm was rendered on Count(s) I

* * *

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	0	IV			3 TO 9 MONTHS DEADLY WEAPON 36 MONTHS 39-45 MONTHS	10 YRS AND/OR $20,000

* * *

4.4 CONFINEMENT ONE YEAR OR LESS: Defendant shall serve a term of total confinement in the King County Jail or if applicable under RCW 9.94A.190(3) in the Department of Corrections as follows, commencing: [ ] immediately; [ ] (Date): _____ by no later than _____.m.

__ [39]__ **months**/days on count ____I___;

* * *

Date: 2/24/00

_____//s//_____
JUDGE
Print Name: LAU

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

EXCERPTS FROM VERBATIM REPORT
OF PROCEEDINGS

DISCUSSION OF JURY INSTRUCTIONS

JANUARY 24, 2000

[796] THE COURT: Let's turn to the next one.

MR. POPE: Shall I call it No. 7 or dumb it back town to 6?

THE COURT: Why don't you call it your number 6.

MR. POPE: The one about intent, so the new number 6—

THE COURT: It is not new anymore, just number 6.

MR. POPE: No objection except as to legibility concerns.

Number 7 about knowingly, no objection except for legibility concerns.

Number 8, which is the Court's Assault 2 definition, no objections.

Number 9, I mean, what is the WPIC definition of that?

THE COURT: 2.06. It is right out of the WPIC.

MR. POPE: 2.06.01 says—

[797] THE COURT: Counsel, quite frankly there is no dispute in this case that we are talking about a gun, so there is no—I was just concerned that with the special verdict definition of deadly weapon it begins with "for purposes of," and tends to limit this instruction to the special verdict, and I wanted to be abundantly clear to the jury that the deadly weapon definition applies to the assault as well. So that is the

only reason I put it in there. They are almost near identical definitions.

MR. POPE: The problem I have with Instruction No. 9, the definition of deadly weapon, is a statutory definition, which is set forth in Instruction No. 2.06.

THE COURT: 0.01.

MR. POPE: 2.06.01 is a definition that is taken out of one particular case of *State v. Beaton*, 34 Wn. App. 125. While that case may have approved the use of that statement, the statutory definition of deadly weapon is contained in RCW 9A.04.110(6), which is in my proposed in my original instruction packet of No. 2.06, which I am limited to the issue of firearm, whether loaded or unloaded, which under the circumstances under which it is used, attempted to use, or threatened to be used, is readily capable of causing [798] death or substantial bodily injury.

THE COURT: Mr. Pope, the comments under 2.06.01 tell us that when the only weapon that is involved was a firearm, that 2.06.01 is just a simplified version. It is exactly the same as 2.06, except in this case there is no question that the only weapon in question is a firearm. It gives the jury just a simplified version of 2.06.

So is your objection that you don't want it, that you think 2.06.01 is not appropriate, nor is 2.06, that there should be no instruction, or are you saying that 2.06 is the appropriate instruction?

If you are saying that 2.06 is the appropriate instruction, it is not, because 2.06.01 tells us that if the only weapon involved is a firearm, as in this case, then the simplified version is the correct one to give them, because it is simple, simple, simple.

MR. POPE: Yeah, because it is—

THE COURT: Which is it? I am not clear what your objection is.

MR. POPE: I believe that my 2.06 does mention firearm and it is the only weapon, firearm, whether loaded or unloaded, and has the statutory language that is not bracketed in 2.06, which under [799] the circumstances in which it is used, attempted to be used, et cetera, and that is the language from 9A.04.110(6). I don't see the point in simplifying it any further.

There is no—my proposed instruction makes it clear that the deadly weapon in question is the firearm, not that some other kind of weapon might have been deadly. Simply states the statutory language of firearm.

THE COURT: I understand your objection.

Your next one, please.

MR. POPE: Okay. Number 10 I believe adequately applies.

Instruction No. 11 is my bodily injury instruction.

Instruction 12, there are a couple things about Instruction No. 12 aside from legibility concerns. As far as the domestic violence interfering goes, if we look at, for example, Instruction No. 14, the issue here is whether or not the defendant prevented or attempted to prevent Amy Recuenco from calling a 911 emergency communication system. So my definition and my proposed 35.—36.56 simply cut it off as attempt to prevent the victim or witness to the domestic violence crime from calling a 911 emergency [800] communication system.

The additional language about obtaining medical assistance or making a report to any law enforcement official contained two things that are not supported by the evidence and obviously are different than the to-convict instruction.

Obviously the issue is whether or not Mr. Recuenco attempted or prevented Ms. Recuenco from calling 911 as well as the other elements that must be satisfied to meet that. There isn't the issue about the other two methods of committing a crime, about the alternatives.

So I would propose after emergency communication system putting a period and striking the additional two comments.

THE COURT: I understand your objection.

And your next one, please.

MR. POPE: The next objection, obviously, was based upon the idea of having the lesser-included offense, which would be adding the words assault in the fourth degree, after assault in the second degree. I will give my arguments about the lesser-included offense a little bit later when I talk about things that I object to not being given.

Instruction 13 is the same that I proposed as [801] a definition of family household members.

Instruction 14 is acceptable, with the caveat that subsection (1) would need to have an assault in the fourth degree added if there is a lesser-included offense instruction given, but otherwise it would adequately define what the situation is, or the to-convict for this offense.

Instruction 15, malicious mischief definition, it is the same as mine, with my continuing concerns over legibility.

Instruction 16 is the same that I propose.

Instruction 17 is the same as instruction I proposed to convict of malicious mischief.

Instruction 18, and that is written by the Court, and—

THE COURT: Well, it is written by the WPIC committee.

MR. POPE: I know. It is proposed by the Court.

THE COURT: Correct. It is required by the WPIC instructions.

MR. POPE: I understand that. The instruction number is?

THE COURT: 18.

MR. POPE: I know. The WPIC number.

[802] THE COURT: 207.02.

MR. POPE: It seemed to accurately reflect what 207.02 would be. The only concern I would have would be to add the language that I had in my proposed instruction of 2.06. Rather than having the simplified version after whether loaded or unloaded, it would be adding which under the circumstances in which it is attempted to be used, attempted to be used or threatened to be used is readily capable of causing deaths or substantial bodily injury, to make it consistent with the statutory definition of deadly weapon in 9A.04.110(6), I believe.

Instruction 19, again this is the—it would be acceptable version of one—if there was no lesser-included offenses being proposed. There are obviously concerns over the legibility. It does have that language in there.

On Instruction No. 20, it is the same as my special verdict instruction, which is appropriate.

Instruction—the special verdict form is the same as what I have proposed, so there is no objection to that.

The Verdict Form A would be acceptable in the absence of a lesser-included offense instruction for assault in the second degree. The Special Verdict Form [803] B and C are acceptable as written.

Now, the remaining issues are about the failure to give instructions, which relate almost exclusively to the lesser-included offense issue. I think several arguments, several thing that are important on the issue of assault in the fourth

degree is that the jury can find evidence of the—can find the crime of assault in the fourth degree based upon other acts that Mr. Recuenco admits to doing, which is primarily we have a situation where he goes into the kitchen, there is a lot of anger and argument between the parties, he then smashes the stove, either with a kettle or pipe, depending upon which evidence is believed, but clearly the stove is smashed. A very startling and angry act.

There is no dispute about the refrigerator being threatened with a pipe. Mrs. Recuenco is arguably in a state of fear and anxiety and distress at this point in time.

Mr. Recuenco admits that he was grabbing to take the telephone out of Mrs. Recuenco's hand. Mrs. Recuenco doesn't testify so much about that issue and she talks about the cord being pulled out of the wall, which might support something different, but based on Mr. Recuenco's testimony, he was attempting to grab the [804] telephone out of Mrs. Recuenco's hands, attempted to do so, unsuccessfully.

Mrs. Recuenco kept Mr. Recuenco backed up and prevented him from actually taking the telephone out of her hands. This is physical contact directed towards Mrs. Recuenco, which certainly any kind of harmful or offensive touching under the statute is considered to be an assault in the fourth degree.

Certainly it is offensive, at the very minimum, to have an object taken out of your hands that you have proper possession of, to be grabbed at. Certainly there could even be an apprehension of harm or bodily injury from that. At any rate, it is a very offensive form of touching. It is something that Mrs. Recuenco avoided, retreated from, trying to prevent the telephone from being ripped out of her hands, after which Mr. Recuenco, being unsuccessful in doing this, ripped the cord out of the wall.

Certainly if the State is going to argue and obviously the Court is focused on the firearm issue, obviously based on Mr. Recuenco's testimony, there would not be any assaultive act with the firearm, but there is an assault to that with the action of going after Mrs. Recuenco and attempting to admittedly get the telephone out of her hands.

[805] Certainly even under the State's testimony, it doesn't particularly contradict that, even though it is happening at a different point in time. Mrs. Recuenco's memory is of Mr. Recuenco pulling the phone cord out of the wall, and her testimony doesn't contradict that that assaultive act could have happened, and Mr. Recuenco is entitled to have under that an instruction on assault in the fourth degree.

Certainly had there not been a firearm involved and the State not been focused on proving a second degree assault, it would be a very logical charge to file for somebody attempting to rip a phone out of somebody's hand.

The issue of aiming the firearm, obviously Mr. Recuenco doesn't testify about doing anything with the firearm that would remotely resemble pointing it at Mrs. Recuenco.

On the other hand, Mrs. Recuenco does testify about the firearm being pointed at her, and simply to a large extent that would be somewhat of a disbelief of part of the elements, but if there is no fear, if there is no intent to inflict fear upon Mrs. Recuenco, or no apprehension of fear on Mrs. Recuenco, then there would be no assault through the firearm being pointed at her.

Certainly that would constitute aiming a [806] firearm under the statute. Mr. Recuenco certainly didn't testify as to any intent to cause any fear on Mrs. Recuenco of being assaulted with a firearm. And Mrs. Recuenco's fear of that, certainly it could be—they could find there wasn't all that much fear based on the fact she didn't say anything when the gun was pointed at her, other than wanting to call the police,

allegedly, and how even after that she didn't have a great fear of the firearm, since according to her own testimony she took it out of the filing cabinet, unholstered, and showed the police officer how the gun was pointed prior to handing it to the police officer.

So certainly even based upon the state's evidence, the jury might not find proof beyond a reasonable doubt of the greater offense of assault with a firearm in the second degree. And the instructions for lesser-included offenses, if the greater included offense is not proved beyond a reasonable doubt, that the jury considers lesser-included offense.

The issue of brandishing or of display of a firearm, Mr. Recuenco testified that he didn't believe that Mrs. Recuenco saw the firearm. Certainly that is his honest opinion, that she did not see it. In fact, he doesn't think she could have seen it, but clearly if Mrs. Recuenco's testimony is believed, she certainly [807] saw the firearm being pointed in some menacing kind of manner, something that caused her alarm.

So there is the unlawful display that is available, just like in *State v. Workman*, that it was a proper lesser-included offense for the crime of armed robbery. The defendants in that case were armed with a rifle and certainly allegations that they had pointed the rifle at somebody and tried to rob them, and the people—the testimony, of course, denied that.

And the Supreme Court in *Workman* said that the evidence in this case clearly supports an inference that the defendant Hughes was carrying a firearm in a manner warning alarm for the safety of others. And that the defendant Workman had handled the gun. So even though he might be guilty of something greater, there is certainly—certainly would support that. The supreme court said surely circumstances of people armed with a rifle intending to exit a robbery would warrant alarm for safety of anyone who might happen to be nearby.

And certainly if Mr. Recuenco, if he pointed the gun at her, it would warrant alarm for her safety, if he was—under the circumstances, you have to keep in mind, listen to this, she has been pretty much scared a lot by the stove being broken, by the [808] refrigerator being threatened, and, under Mr. Recuenco's testimony, the phone ripped out of the wall. So if she wanted to call the police, certainly one would think she is afraid. And then she—he goes—even going to put the gun away, she knows where the gun is.

Regardless of whether she knew the gun was on top or inside of the cabinet, she would know that that is where the gun is kept. She sees him going towards the gun. He has done a lot of things to frighten her, scare her. She already tried to call the police. She admits she saw him go over there. He didn't check and see whether she was watching or anything. He doesn't know what happened afterwards, but she admits she saw him going over there.

It seems—and he said an expletive about the gun and goes to get the gun. It is certainly something, even if he just put the gun away, even if she didn't necessarily see exactly what he was doing with it, if she even saw him take the gun and put it inside of the filing cabinet, it could be something that could reasonably under these circumstances warrant an alarm for her safety and well-being, because that could be a very scary situation. If it was handled in some manner differently, that would also be scary.

[809] I definitely think the assault in the fourth degree and the unlawful display of a weapon would be supported and probably the aiming as well, Your Honor.

THE COURT: Thank you, Mr. Pope.

Mr. Kimball, do you wish to respond with regard to argument concerning the lesser?

MR. KIMBALL: No, Your Honor, only to say that I think under the *Workman* analysis the Court has accurately evaluated the propriety of including either of those two instructions. I believe that the *Workman* analysis boils down to whether or not in committing the higher offense you necessarily have to commit the lower, and I would argue to the Court that clearly that, given the standards, that that is not the case here. They are not lesser includeds. And I would agree with the Court's analysis. And that is all I have.

THE COURT: The defendant's objections are denied.

First, let me begin with the assertion that the copies are too light. As I indicated, even without darkening them, I have no trouble reading them. And we will darken up the copies that go to the jury, in any event.

With regard to Instruction No. 9 and defense [810] counsel's objection, the comments to WPIC 206 and 206.01, the objection is not that the deadly weapon should not be defined for the jury, but the objection is that the more complicated 206.01 definition should be given.

However, the WPIC comments instruct that if the only weapon involved is a firearm that the simplified definition of deadly weapon should be used, and that is WPIC 206. And indeed the Court is giving only the more simplified version, since no other weapons are the subject of this trial, other than a firearm.

With regard to Instruction 12 and defendant's objection, counsel makes a distinction between the definition instruction, which is correct. It gives the entire definition of interfering with a domestic violence—interfering with domestic violence. However, the to-convict instruction instructs them only as to the 911 emergency communication. It is that instruction, the to-convict instruction, that governs what elements the jury must find in order to convict the defendant.

Therefore, the definition instruction is an accurate statement of the law. That is the definition, and read together with the to-convict instruction, [811] which is Instruction 14, that instruction specifically tells the jury what the elements are that the state must prove beyond a reasonable doubt. And it only involves—that is Element No. 3 of Instruction No. 14—it only involves preventing or attempting to prevent the victim from calling a 911 emergency communication system. Therefore, 13 and 14 both read together are an accurate statement of the law and does not mislead or confuse the jury.

With regard to Instruction No. 18, again, the defense wishes to propose a more complicated instruction for deadly weapon, 206.01. The Instruction No. 18, which states and discusses the purpose for the special verdict and the requirements that the jury must find for a finding of a deadly weapon to enhance the sentence in this case is a correct statement of the law and does not suggest that 206.01, the more complicated definition for deadly weapon, should be substituted. 18 is a correct statement of the law. And read together with all of the instructions, as the jury will be instructed to do, is a correct statement of the law. It is clear and it is not confusing.

With regard to counsel's very lengthy argument as to the propriety of a lesser-included instruction, it appears that counsel is arguing that [812] Assault 4, aiming a weapon, and, more specifically, that Assault 4 somehow is a lesser included of the charged offense of interfering with a domestic violence reporting.

The state has chosen to charge that offense rather than the Assault 4 arising from the struggle and the disconnecting of the telephone. *Workman* governs this Court's analysis of whether or not a lesser-included instruction should be given.

Let me begin with aiming a firearm. Pursuant to RCW 9.41.230, by its terms, the statute provides that it only applies

to conduct not amounting to a violation of Chapter 9A.36, which deals with assaults and physical harm, so that aiming a firearm cannot be a lesser included, and is not appropriate to be given in this case.

With regard to the assault in the fourth degree, assault in the fourth degree could be a lesser included or it could be and/or a lesser degree of assault in the second degree. However, this Court need not reach whether it satisfies the legal problem of *Workman* because it cannot satisfy the factual prong. *Workman* requires that there be some facts that support that only the lesser-included offense or the lesser degree offense of assault 4 be inferred from the facts. [813] There is simply not a scintilla of evidence that supports the giving of assault in the fourth degree as either a lesser included of assault in the second degree with a deadly weapon or a lesser degree.

Under the theory that it is a lesser included or a lesser degree, the law in *Workman* requires that there be facts to support the lesser included or the lesser degree. There are numerous cases which I cited to counsel that require that the jury simply not disbelieve the state's case, but that there must be a affirmative proof that only the lesser-included offense or the lesser degree offense was violated.

In this case, though the record speaks for itself, the only evidence of an assault that has been charged in this case is the pointing of a weapon at the victim in this case. There is no evidence that a weapon was displayed. In fact, the defendant testified that the only time the gun was in his hand was when he took it from his car and placed it in or on top of the file cabinet that this jury heard so much about, and the second time he touched the gun was when he realized during the course of the argument in the kitchen that the gun was on the file cabinet in open view and that he was worried that the police were on their way, and therefore went to the file cabinet, picked the gun up, [814] and placed it in a drawer.

He in fact testified that the victim was not even in the room at any time when he touched the gun.

In light of the defendant's own testimony, there simply are no facts that support the lesser included or the lesser degree crime of assault in the fourth degree.

The same is true of displaying the firearm, which is requested by the defense, as well. *State v. Karp*, 69 Wn. App. 369, a Division II, 1993 case, review denied by the supreme court, is almost on point. In that case the defendant admitted that he pointed a gun at the victim, unlike the facts in this case. However, the argument is the same. He argued he was entitled to the lesser of unlawful display because he pointed his gun.

The only facts in this case are that the defendant pointed the gun at the victim. The court stated that although the defendant's conduct also supports an inference that he violated the unlawful display statute, the evidence does not support an inference that only that statute was violated, and therefore the defendant is not entitled to a lesser included. It is simply not enough for the jury to disbelieve the state's evidence. There must be some [815] evidence that supports the inference that only the lesser was committed.

See also *State v. Chartes*, 126 Wn.2d 353 (1995).

Counsel, please be prepared tomorrow morning at nine a.m. to begin closing remarks after I have instructed the jury.

Thank you.

MR. POPE: Your Honor, I understand the Court's ruling on that. I don't think it would change the Court's analysis. Just for the clarity of the record, I would argue that the scuffle over the telephone could have been an assault in the fourth degree as a lesser included to the assault in the second degree, not particularly as some alternative to interfering with the domestic violence reporting, although certainly you could

commit both at the same time. But it would be—I argue that that would be a lesser degree to second degree.

THE COURT: Understood.

MR. POPE: And I believe I made a record about all of the different special verdict forms and the definition and instructions for the three lesser-included offenses without having to recite those in detail. That is accepted for the record and I don't [816] have to go through and say what those instructions would have been because I think it is pretty obvious what they would have been.

THE COURT: Thank you, counsel. We will see you tomorrow at nine.

(The Court is recessed.)

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

EXCERPTS FROM VERBATIM REPORT
OF PROCEEDINGS

DEFENDANT'S MOTION TO VACATE

FEBRUARY 24, 2000

* * *

[902] THE COURT: Mr. Pope, please address the second ground.

MR. POPE: Okay. I guess the main new argument is over the jury instructions that were requested and not granted. The first issue is over the firearm. The definition of firearm under statute 9.41.010(1) being a weapon or device from which a projectile my be fired by explosive such as gunpowder, that is a statutory definition of firearm. That is the instruction provided in the WPIC. It is important for that to be given so that the jury knows what a firearm is. It is an element of the offense.

In this case, the states tries to say it is not an element because you could commit assault in the second degree by some means other than deadly weapon or use some deadly weapon other than a firearm.

In this case, the allegation and the basis on which this case was tried was under the theory of firearm. Therefore, if it is a deadly weapon you have to find what a deadly weapon is. Apparently the statute says it can be interpreted as a firearm being a [903] per se deadly weapon, although we would urge the more expansive definition of firearm. But there is no—but in this case, the firearm has to be defined. If it was a deadly weapon—if it was a knife you would have to give a more expansive definition of deadly weapon. It has to be defined what it is, just like any other offense.

Number two, the—there is no—the weapon was admitted. There was something admitted into evidence. The fact that—but there is no testimony or evidence about it being able to fire a projectile by means of explosive such as gunpowder.

Now, the state tries to say that a non-working firearm could also be a basis for this offense, and certainly it can be, but there would have to be some evidence about this being something that could at least theoretically fire something, whether it works or not. There is no testimony about it.

Simply because a piece of evidence was admitted, that—obviously it was without objection. There wasn't a basis to object to it, really. Simply because it is admitted into evidence, if there is no testimony or evidence about it being something that is designed or capable or at least theoretically capable of firing a projectile by explosive or something like [904] that, then there is no evidence to support that, that it is a firearm.

Number 3, the deadly weapon, we need to be properly defined. We talked about that in more detail earlier, so I won't go into it as much now, but especially if there is not a legal definition of firearm, basically what we have done, deadly weapon is something that is generally if it is under the circumstances used, attempted to be used or threatened to be used, readily capable or at least apparently capable of causing death or substantial bodily injury.

We have cut that out, cut it down to firearm, and then the Court did not even give a definition of what a firearm is. So maybe with a fuller definition of firearm the error would not be prejudicial, but you cut the meat out of deadly weapon and you cut the meat out of firearm, so that the jury doesn't have anything to go by in this situation.

THE COURT: Five minutes.

MR. POPE: Then you have number four. We had the definition of pistol under the statute 9.41.01(2), under WPIC 133.50, which we also requested be given, because we have firearm, and also the pistol. And the instruction for the deadly weapon special verdict talked about pistol or firearm or other weapon, and we [905] did not give the definition of pistol in this situation.

The issue of the lesser-included offenses, I think that especially the assault in the fourth degree, I don't think that the Court gave enough—the Court talked a lot about aiming the firearm and unlawful display of the weapon, but the assault in the fourth degree when Mr. Recuenco was attempting to grab the telephone set or cord from Ms. Recuenco, the state tries to say Mr. Recuenco gave a lot of inconsistent statements about that.

They simply—it is more like the state disagreeing with what Mr. Recuenco said. Obviously the jury may disagree with a lot of what he said, too. But he did say he was struggling with her over the telephone. The state obviously tried to get minute detail out of Mr. Recuenco, just like I did with Mrs. Recuenco. But certainly under those circumstances this would have put—either been an attempt to do an unlawful touching or grabbing of Mrs. Recuenco by grabbing something out of her hand or putting her in fear of receiving an unlawful touching or battery, both of which are assault in the fourth degree, which is a lesser offense to assault in the second degree.

Clearly Mrs. Recuenco would have been [906] frightened very traumatically by this. There is the stove being smashed. There is testimony from the daughter at least about the glass flying all over the place, and some dispute about how the stove was smashed. No dispute that Mr. Recuenco got a pipe and threatened to smash the refrigerator as well.

Certainly these events happening after that, it would have been quite reasonable for Ms. Recuenco to be in fear of either being battered by Mr. Recuenco when he was grabbing the phone or Mr. Recuenco was certainly attempting to get the phone out of her hands, which is taking something out of somebody's hands is a battery. Attempting to do that, also it is assault under the criminal definition. Attempting to do that is assault. That instruction should definitely have been given.

The aiming of firearm, I guess it depends on the question of whether it is an issue of whether some of the state's evidence being disbelieved or being a reasonable interpretation that could be gotten out of that evidence.

The unlawful display of a weapon, you simply have to handle the weapon in such a manner that causes alarm for somebody's safety. And whether or not Mrs. Recuenco—Mr. Recuenco didn't think she could see it, [907] when—according to his testimony, but he would have been able to—certainly she saw him if his testimony is believed, she would have been able to see him run or walk towards the filing cabinet where the gun was on top and do a motion that would be handling the gun.

Whether or not she could actually see the gun in his hand or not would be irrelevant. It would certainly be quite frightening and alarming to somebody under those circumstances if they saw Mr. Recuenco doing something that was obviously handling a gun.

You have it on top of a filing cabinet, going towards the filing cabinet. Whether they see it or not, they see that, and handling it, opening the drawer up, things like that, and that would be quite alarming to Ms. Recuenco's safety.

Certainly according to his testimony, after this happened, she ran into the bedroom, which will be consistent with her being frightened by all this. So that the one definitely should have been given because it doesn't even require a disbelief in

the—simply disbelieving the state's testimony, it is a reasonable inference out of what Mr. Recuenco testified to that, that would have been quite frightening to Mrs. Recuenco, especially under the circumstances where he smashed the stove, glass all over the place, threatened [908] to smash the refrigerator, and yanked the telephone cord out of the wall after a struggle or attempted struggle over the telephone. That would certainly be alarming to see him doing anything that looked like handling the firearm.

Those instructions should have been given, Your Honor, and certainly the definition of pistol and firearm we requested should have been given, especially in light of the abbreviated version of deadly weapon that simply said firearm without defining anything about what a firearm is.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Pope.

Mr. Kimball, briefly, please.

MR. KIMBALL: May it please the Court, the defense asks Your Honor to vacate the judgment based on Criminal Rule 7.4 and 7.6.

THE COURT: Can you speak up?

MR. KIMBALL: Under 7.6 there is no basis on this record to find that a substantial right of the defendant has been materially affected. Counsel urges the Court to find that WPICs 2.06, 2.07 and 2.10 should have been given to the jury. A reading of the comments to those WPICs clearly provides guidance to trial attorneys and the Court under which forms of the [909] instruction should be given to the jury.

When you read the comments and you read 2.06 it talks about when a firearm is the only weapon alleged to have been used in committing the assault that you go to 2.06.01, which is what the Court did.

Similarly, 2.07, the supreme court committee which drafts the standard instruction advises the Court and counsel how to handle that situation. And again the Court followed that directive. It used 2.07.02.

The confusion comes in what counsel asked that 2.10 be given. If you examine 2.10, it defines firearm. Clearly the WPIC comment note on use provides that this instruction should be used when there is a special allegation that the defendant was armed with a firearm, and in fact the title to that WPIC reads firearm—the WPIC 2.10.01 reads that firearm definition for sentence enhancement special verdict shall be used when a firearm is known.

The elements that the Court has defined for the jury were an assault in the second degree. The method under which the state is alleging and the jury found the assaults committed was by use of a deadly weapon.

The Court was obligated to define deadly weapon, which it did, using the WPIC instruction. [910] There is no—in the crime charged and the enhancement the state alleged, there is no elements of a firearm. The element is assault with a deadly weapon.

The WPICs take great care in not requiring the Court when it provides instructions on assault in the second degree, deadly weapon, to define firearm. In fact, if you read the comments 2.10.01, and comments to 2.07 and .06, it distinguishes when the special enhancement is strictly a deadly weapon from when the special enhancement is firearm. There no obligation for the Court to define firearm in the manner in which Mr. Pope is asking.

Furthermore, there is no testimony and no issue on the record before the Court that the operability of the firearm was ever disputed. The officer that testified—I believe Officer Lucas testified as to the nature of the firearm, how it worked. There was no objection when it was admitted into evidence.

Furthermore, it is not a case where the trier of fact, in this case, the jury, was asked to decide whether or not a crudely made zip gun or a pen gun or older clearly questionable rusty or by appearance inoperable gun was used. The gun that was used was, even by counsel's own record, oiled, had all the [911] indicia of operability. And counsel clearly waived that objection when he failed to object when it was admitted into evidence.

On the issue of lesser-included instructions, the Court did provide to the jury instructions on assault in the second degree-deadly weapon. There is no basis for the Court to provide to the jury unlawful display of a weapon. There was no basis also for the Court to have been obligated to provide to the jury pointing a firearm.

To be sure, if you point or aim a firearm at a person, that can be one of the bases under the legal prong to constitute assault in the second degree. But under the *workman* analysis, this argument fails, because there is no basis, no argument on the record that only the lesser-included offense was committed. That goes for pointing and aiming a firearm, unlawful display, and Assault 4.

The record is, I think, bountifully sufficient with testimony and evidence that not only was a firearm pointed, but it was pointed at Ms. Recuenco's face out of anger, that she was placed in apprehension and fear that she might be shot. That constitutes assault in the second degree, deadly weapon. It is not simply pointing or aiming a firearm.

[912] The fact that an assault is the precursor to assault in the second degree, Assault 4, counsel argues that Ms. Recuenco may have been placed in apprehension of fear, given there is a potential struggle for the phone. Clearly the record did not reflect that there was a struggle. Mr. Recuenco admitted to the police he simply yanked the cord from the wall. There is a

real material issue of dispute as to if the struggle in fact ensued.

The bottom line is it is not merely enough that the Court or jury be asked to disbelieve the state's evidence. There was a compelling record made to support to assault in the second degree deadly weapon. There is not a basis to find that only lesser includeds were committed by the defendant.

I would ask the Court to affirm or not question the judgment of the jury, not vacate the judgment. No rights of the defendant have been substantially affected by this Court's decisions. I would ask Your Honor to deny the motion and proceed to sentencing on the charge Mr. Recuenco was convicted of in mid January.

THE COURT: Thank you.

Mr. Pope, five minutes, sir.

MR. POPE: Very briefly, Your Honor, the [913] firearm is a element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury.

The Instruction No. 9, the Court said the term deadly weapon includes any firearm, whether loaded or not. The word firearm was not defined for the jury. Instruction No.— that related to assault in the second degree, one of the things according to that.

Instruction 18, the special verdict instruction, it has—the second sentence says pistol, revolver or any other firearm as deadly weapon, whether loaded or unloaded. In that case, the terms pistol and firearm are statutory in terms with a specific definition and statute under 9.41.010(1) and (2), which are important to be given. For both of those reasons, the firearm and the pistol should have been defined to the jury.

It is a element of the offense. It is an element of the special verdict as defined. First of all, you start with a deadly weapon, under statutory definition of second degree assault,

and there is another statute that talks about the definition of deadly weapon. It includes firearm, whether loaded or unloaded.

And then you have to go to the definition of [914] a firearm to find out what a firearm is. That is an element. Firearm is something in which a projectile can be fired by gunpowder or explosive. That becomes a part of the definition of the element of deadly weapon. And then deadly weapon is part of the element of assault in the second degree committed by a deadly weapon. This is an element of the offense.

Similarly, both pistol and a firearm are elements of the special verdict instruction as given on Instruction No. 18.

The other thing is I obviously argued for more expansive definition of deadly weapon under the statute. I think perhaps if it would not be so prejudicial if the statutory definition had been given, and the statutory definition of pistol for the special verdict, but certainly in the absence of that, there would need to be the full statutory definition of deadly weapon and not just what apparently appears to be an abbreviated per se version about firearm, unloaded or loaded, especially without a definition of firearm.

The issue of the weapon in this case, obviously whether we—obviously we didn't raise that as an issue per se in the sense of developing evidence on there because it wasn't in our interest to do so. [915] But there was no evidence given that this weapon either could or was at least designed to fire a projectile by explosive such as gunpowder. Obviously the question of whether it actually worked or not would be irrelevant under case law, but whether or not the weapon as designed and intended could fire a projectile, not just this one in question but anything like that, there was absolutely no evidence given on that.

So the firearm element is not satisfied, especially since we relied upon the per se definition of firearm. If we used a

more expansive definition, it could have looked scary, but in this case the jury was instructed only on firearm. That is the law of the case and there is no evidence about the statutory definition of firearm under 9.41.010(1).

The lesser-included instructions, all I can say is the state talked about how there is a material issue of dispute over the struggle for the telephone. Right there, the state is admitting that there is a material issue of fact as to the struggle over the telephone. Certainly, Mrs. Recuenco didn't talk much about that.

Mr. Recuenco talked a great deal about that. His testimony creates a material issue of dispute, and all there has to be for a lesser-included instruction [916] is a genuine issue of material fact through—some of the cases talk about it being a more permanent thing. In this case, Mr. Recuenco did provide testimony about the struggle over the telephone, and certainly all of the other circumstances could support that.

The—I already said what I said on the display of weapon. I think that that would definitely be a very strong case for a lesser-included instruction on that issue.

The question of the aiming a firearm, I guess that would be one of my weaker points about lesser-included instructions. But I think that would be appropriate as well.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Pope.

The issues raised by defense counsel were issues that were argued extensively before this Court prior to the Court instructing the jury. For the same reasons I articulated then, I adopt now and rely on the state's submissions as well. The motion is denied. The jury was properly instructed.

Let's turn to sentencing.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

EXCERPTS FROM VERBATIM REPORT
OF PROCEEDINGS

SENTENCING HEARING

FEBRUARY 24, 2000

* * *

[917] THE COURT: Mr. Recuenco, if you will come forward for sentencing, please.

MR. KIMBALL: Has Your Honor received the presentence report from the Department of Corrections?

THE COURT: I have, and I read all the materials.

MR. KIMBALL: This is the sentencing on Arturo Recuenco. The charge he is being sentenced for before Your Honor is assault in the second degree with a deadly weapon. He is also being sentenced on two misdemeanors on which he was convicted by the jury, Counts 2 and 3, interfering with domestic violence reporting, and malicious mischief in the third degree, respectively.

The offense, the felony offense, Your Honor, is a Level 4. Mr. Recuenco does not have an offender's score. It is zero. His range therefore would be three to nine months, with a maximum term of ten years and/or 20 thousand dollar fine. The deadly weapon enhancement, however, is a 36-month enhancement by statute.

The state, Your Honor, is asking this Court [918] to impose the low end of that three to nine months and to follow the requirements of the mandatory enhancement for 36 months, giving Mr. Recuenco 39 months on Count 1, Assault in the Second Degree With a Deadly Weapon.

On the remaining two counts, Your Honor, I am asking this Court to suspend time on those two. Count 2, the interfering charge, is a gross misdemeanor with a maximum of a year in the county jail and a maximum fine of five thousand dollars. I am asking Your Honor to suspend that time.

Count 3 is a simple misdemeanor with a maximum of ninety days and/or a one thousand fine. I am asking the Court to suspend that time as well.

I am also asking the judge—one second, Your Honor.

I asking very importantly for the Court to order no contact with Amy Recuenco. And this issue has been visited prior and since the jury verdict. I think counsel and I were before Your Honor to discuss amendment to the no contact order. I would simply ask that the Court sign off on an order as condition of sentence which carries over the same conditions we agreed to.

Your Honor imposed, I guess, a month or so ago that he have no contact with Amy Recuenco, contact only [919] with the children per the family order, which was telephonic contact only twice a week.

I believe Mr. Pope could help on this. I believe it was Tuesday and Thursday.

MR. POPE: That is what the order provided.

MR. KIMBALL: That is what Your Honor signed off on to again impose.

The Court obviously recalls. The trial was fairly recent. And I won't go into the facts of it at all. I think this is a very potentially life-threatening situation for Amy Recuenco. I think you have a situation where you have a man who when angry is violent, and his violence is manifested in, I would argue, a psychological cycle of abuse regarding Amy Recuenco, that possessions of her were broken, that she was

yelled at, she was put down. And as she said to the jury, she had no dignity or self respect in this relationship.

The concern the state has is that you have a man who is angry, smashes items in the house in the presence of his children, then has a handgun.

Even if you take the most bare bones admissions by the defendant, a handgun had been sitting out at his house where children could access it. And you have his kids hiding in a bedroom, not knowing if [920] their mom will be shot when the parents are having this argument. It is a extremely volatile situation. I think the jury agreed with that fact and the dynamic.

I would ask the Court to impose—I think is obligated to impose the 36 months. And I think the state is being generous by not asking for anything higher on the misdemeanors or high end of the Assault 2 range. 39 months should be imposed. This is a serious offense. It is a life-threatening situation. And the jury agreed with that.

That is all I have, Your Honor.

THE COURT: Mr. Pope.

MR. POPE: Well, basically on the sentencing, on the basic sentencing range, I think three months would be appropriate for the basic part of that. That is the low end of the range the legislature provided. There is obviously many different ways in which you can commit assault in the second degree with a deadly weapon. In this case, it was simply aiming and a threat, as presented to the jury. There was no actual threat by Mr. Recuenco to use the firearm, no attempt to actually use the firearm.

Had those kind of things happened, it would still be assault in the second degree with a deadly weapon, if that is what happened.

[921] He does have no criminal history, which obviously a zero offender's score is presumed in the standard range, but there is no history whatsoever. He's had the same job for the last 18 years, been very stable, been otherwise, at least outwardly, a very nice person.

It certainly was unfortunate he had the marital problems he and especially the wife has been talking about. But that would be an appropriate three months at the low end of the standard range for the basic part of the sentencing.

The issue of sentence enhancement, looking at this, this case, 36 months would have applied if the state alleged and proved the use of a firearm and there had been a jury verdict about a firearm on the special deadly weapon verdict.

In this case, however, the state alleged and proved a deadly weapon without specifying a firearm. The jury verdict returned was the general deadly weapon verdict under WPIC 1.90.01 and not the firearm special verdict under WPIC 1.90.02.

The instruction given for the special verdict was a deadly weapon special verdict instruction under WPIC 2.07.02, and not the specific instruction for a firearm special verdict under WPIC 2.10.01.

[922] The case law under *State v. Workman*, one of the things about that case is that the prosecutor has the discretion whether to add special enhancements for firearms and/or deadly weapons, with quite a bit of latitude in that situation.

The prosecutor can charge the basic assault in the second degree with a deadly weapon if they feel that a three to nine month sentencing range is appropriate. They can add a deadly weapon thing to it, which would make it a 15 to 21 months. They can specifically allege a firearm as a special allegation, which makes it 39 to 45 months.

In this case, the state chose the intermediate level of alleging a deadly weapon without making the specific firearm allegation. The state—in addition, the state, of course, did not propose a firearm special verdict or a firearm special instruction. They didn't even propose a deadly weapon special instruction for the verdict, but the Court did supply that. And that was how it was tried to the jury and that is what Mr. Recuenco has been charged and convicted of.

Workman makes it very clear that any allegation of firearm or deadly weapon has to be alleged in the information.

[923] There is also *State v. Luwa* (phonetic) that says that the state must prove beyond a reasonable doubt every essential element of the allegation that triggers the enhanced penalty.

In this case, the state has chosen simply a deadly weapon enhancement rather than the special enhancement for the firearm.

Under this circumstance, the 12 month enhancement would be appropriate as a matter of law.

Now, the issue of the misdemeanors, obviously the sentences for those should be served concurrently with the felony sentences.

I took a little bit different approach than the prosecutor. I was obviously—I usually like to respond to what the department of corrections has to say. And on the malicious mischief in the third degree, I would recommend somewhere between zero and 15 days, to be concurrent with the felony, serving the felony sentence.

Had he only done that, it would have not been such a major thing, although it was rather alarming the way he did damage the stove, although it was something that he had at fifty percent interest in and he did it when he got angry over a dispute about the cooking.

The interference with domestic violence [924] reporting, I believe that a sentence of between 15 and 30 days, concurrent with the felony sentence, would be appropriate. Obviously the Court has to take some look at what offense was being interfered with, which obviously was a serious offense.

On the other hand, after doing this, according to—especially according to the theory under which Mr. Recuenco was convicted, there was no further violence or threats or any other law violations after Mr. Recuenco pulled the phone out of the wall. So that make it less serious than some other things, because obviously the legislature had in mind that somebody could go—after pulling the phone out of the wall, they might beat up their significant other or do further criminal acts after the contact with the police is denied.

In this case there was no further criminality by Mr. Recuenco after the telephone was taken out of the wall.

There are also issues of domestic violence treatment and the no contact order. I think in the no contact order it should be with Mrs. Recuenco. I think that is best handled with this Court—by being imposed by this Court and by being something if they ever want to change for whatever reason they would have [925] to come back in this Court and do that.

The issue of the children, however, there is a domestic violence protection order in place. Presumably, one of the spouses will file a dissolution, or perhaps a legal separation action, depending on how—whatever they chose to define that as, which is going to develop a parenting plan for the children, which is obviously going to take into account whatever incarceration Mr. Recuenco has and whatever happens after that.

I believe that this issue of contact with the children should be something that he should follow the family court orders on. Presently there is nothing with a supervised contact via telephone—actually, contact by telephone. And how can he

do that from prison? It will make the logistics rather interesting.

Obviously as a domestic relations proceeding goes further there could be some provisions for whatever in the future.

It may be appropriate for Mr. Recuenco to write letters to his children, because contact by telephone from prison can be very difficult. They don't like to do three-way calls.

Mrs. Recuenco will probably not be accept the charges. Whether his relatives want to fund it is a [926] good question. But in all likelihood the main method of communication while in prison would be by writing letters. He certainly should not be prohibited from that in prison. Or if the prison allows visits and somebody is willing to take the children there, then that certainly should not be prohibited either, because that would be something that would be certainly under supervised conditions, as all of those situations are.

After he is released, then I think things would be looked at further. He would probably have a modification of the parenting plan at that point to take into account the fact that he is out of prison.

The domestic violence treatment is probably something better left to the family court proceedings, because it is mainly going to be issues over what the terms and conditions of Mr. Recuenco having contact with his children after release from imprisonment.

Certainly if there is the treatment available in prison, hopefully he will avail himself of that, although our corrections system tends to be somewhat short on treatment and long on punishment.

So that is what I have to say, Your Honor.

THE COURT: Thank you, Mr. Pope.

Mr. Recuenco, this is your opportunity to address the Court before I impose sentence. You don't [927] have to say anything unless you wish to do so.

MR. RECUENCO: Your Honor, I would really like to have contact with my kids when I am incarcerated. I do love them very much and I really want to have contact with them, basically. If they are available, some relatives of mine could pick them up and take them to wherever I am for visit.

THE COURT: Is that all?

MR. RECUENCO: I would abide by any rules you are going to put on me, Your Honor.

THE COURT: Thank you.

Mr. Pope, are there any objections to the recommended conditions that are set forth in Appendix H by the Department of Corrections? They are all permitted by statute.

MR. POPE: Appendix H, I guess on numbers—obviously the ones that are mandatory are mandatory. The number 10, 11, and 13 are fairly standard in something like this.

THE COURT: So, no objection?

MR. POPE: Number 12, I think, not to say there is necessarily an objection in principle to Mr. Recuenco having domestic violence treatment, I just think it is something that is better left to whatever the family court decides.

[928] THE COURT: Thank you.

Is there any restitution?

MR. KIMBALL: The state is not asking for restitution, Your Honor, I would waive that.

THE COURT: As to Count 1, the Court will impose 39 months. The Court has no discretion but to impose the statutorily mandated term with regard to the deadly weapon enhancement.

As to Count 2, which is a gross misdemeanor, the Court will impose a year in jail and suspend all of that time.

As to Count 3, the Court will impose 90 days and suspend all of that time.

As to the misdemeanors, Counts 2 and 3, there they are to run consecutive with the felony and consecutive with each other.

The Court will impose all of the conditions set forth in Appendix H, the judgment and sentence, as recommended by the Department of Corrections.

The Court does not waive any of the mandatory conditions.

The Court will impose a five hundred dollar victim penalty assessment under the felony only. Interest is waived on that amount. And by statute there will be a one-year term of community placement.

* * *

Supreme Court, U.S.
FILED
DEC 14 2005
OFFICE OF THE CLERK

NO. 05-83

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

On Writ of Certiorari to
the Supreme Court of Washington

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, IOWA, KANSAS, MAINE, MICHIGAN, MONTANA, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement?

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are States that will be substantially impacted by a system that requires automatic reversal of criminal convictions for constitutional errors or defects that have "little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22 (1967).

The "harmless error" rule announced in *Chapman*, and applied in some form in all fifty States, *Chapman*, 386 U.S. at 22, discourages retrial of cases in which a constitutional error had no effect on the outcome. *Id.* Six years ago, the Court extended *Chapman* to instructional errors that *in theory* prevent the jury from determining an element of an offense, but which do not *actually* contribute to the verdict. *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, an instructional omission was harmless because the omitted element was uncontested and supported by overwhelming evidence.

A year after deciding *Neder*, the Court turned to sentencing practices. It concluded that for purposes of the Sixth Amendment's jury trial guarantee, any fact necessary to support a sentence above the maximum authorized based solely on the statutory elements of the crime ("sentence-enhancing facts") is the "functional equivalent" of an element of a greater crime. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000). Therefore, any fact (other than a prior conviction) that is legally necessary to support a sentence exceeding the maximum authorized by the statutory elements established by a jury verdict must be submitted to the jury and determined beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 756 (2005).

In this case, the Washington Supreme Court held that a jury's failure to determine a sentence-enhancing fact — namely, whether the defendant was armed with a "firearm"

during an assault — could not be harmless, even though *the defense conceded at trial that the error had no effect on the outcome*. *State v. Recuenco*, 110 P.3d 188, 192 (Wash. 2005). If the Washington Supreme Court is correct that the jury's failure to determine a sentence-enhancing fact because it was not instructed to do so can never be harmless, then a jury's failure to determine an element because it was not instructed to do so cannot be harmless, either. In other words, upholding the Washington Supreme Court's decision would lead inexorably to the overruling of *Neder*.

Amici Curiae include States that follow *Neder* expressly or apply a state rule that parallels *Neder*. *See, e.g., Griego v. People*, 19 P.3d 1, 8 (Colo. 2001) (citing *Neder*); p. 24 and n.1, *infra* (listing decisions applying *Neder* to the absence of a jury finding on a sentence-enhancing fact); Appendix (listing decisions expressly applying *Neder* to the absence of a jury finding on an element). If this Court affirms the Washington Supreme Court, it would require automatic reversal and retrial in many cases in which the omitted element or fact was uncontested or supported by overwhelming evidence. These retrials will impose a substantial burden on the States.

SUMMARY OF ARGUMENT

I. Under the Sixth Amendment's jury trial guarantee, any fact (other than a prior conviction) that is legally necessary to support a sentence exceeding the maximum authorized by the statutory elements of the offense must be submitted to the jury and determined beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220, 25 S.Ct. 738, 756 (2005). These cases hold that sentence-enhancing facts are the "functional equivalent" of elements of the offense for purposes of the

Sixth Amendment jury trial guarantee. *Apprendi*, 530 U.S. at 494 n. 19.

Apprendi and its progeny have not held, however, that *Apprendi* errors always require reversal. The Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), all but forecloses that possibility. In *Neder*, the Court held that a jury's failure to determine an element of an offense because the element was omitted from or misdescribed in jury instructions does not automatically require reversal. Rather, such errors may be harmless under *Chapman v. California*, 387 U.S. 19 (1967). For example, such errors are harmless when the "missing" element is uncontroverted and supported by overwhelming evidence. *Neder*, 527 U.S. at 18-19. If sentence-enhancing facts are the "functional equivalent" of elements for purposes of the Sixth Amendment jury trial guarantee, and if the absence of a jury finding on an *element* is harmless when the element is uncontroverted and supported by overwhelming evidence, then the absence of a jury determination on a *sentence-enhancing fact* should be harmless under those same circumstances. Those circumstances exist here.

The Washington Supreme Court, however, concluded that when a jury instruction omits a sentence-enhancing fact, thereby precluding the jury from making a finding on the issue, the sentence must be vacated even if the jury would surely have found that fact had it been properly instructed. *State v. Recuenco*, 110 P.3d 188, 192 (Wash. 2005). If upheld, this conclusion would cast serious doubt on *Neder*.

II. This case does not warrant an historic break with *Neder*. For nearly a century, American courts have been committed to a common-sense focus on reversing only those errors that prejudice the defendant. *See, e.g.*, *Chapman*, 386 U.S. at 22. Although there are some rights so critical to a "fair and correct judgment" that any violation cannot be

tolerated, *Rose v. Clark*, 478 U.S. 570, 578 (1986), the Sixth Amendment's jury trial guarantee is not among them.

The Sixth Amendment's jury trial right reserved judicial power in the people. *Blakely*, 542 U.S. at 306. That reservation, however, was not grounded on a belief that judges are inherently less accurate factfinders than ordinary citizens. In fact, scholars still debate whether unbiased juries or unbiased judges are more likely to arrive at the truth. *See Schriro v. Summerlin*, 542 U.S. 348, 355-56 (2004). Therefore, it is "implausible that judicial factfinding so seriously diminishe[s] accuracy as to produce and impermissibly large risk of injustice." *Id.* at 355-56 (internal quotation marks and citations omitted).

Errors that require automatic reversal without a review for their actual impact on the verdict — *i.e.*, "structural errors" — are those errors that so undermine the fundamental fairness of a trial as to render it an "unreliable vehicle for determining guilt. *Rose*, 478 U.S. at 577-78. They are, however, the "exception, not the rule," *id.* at 578, and this Court has suggested in a different context that it is "unlikely that any more remain to be discovered." *Schriro*, 542 U.S. at 352 (citation omitted).

Because a Sixth Amendment violation stemming from the absence or misdescription of an element from jury instructions does not undermine the reliability of the result when the jury would surely have found the element given proper instructions, such a violation is not one of the "very limited" class of structural errors. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

Such violations are "markedly different" from the case in which the jury receives a defective reasonable doubt instruction that permits conviction upon proof less certain than "beyond a reasonable doubt." *Fulminante*, 499 U.S. at 309; see *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Indeed,

Neder distinguished *Sullivan*, and the distinction remains valid. *Neder*, 527 U.S. at 10-12.

Further, the *Apprendi* line of cases does not imply that the absence of a jury determination on a fact necessary to sustain a particular punishment — be it a sentence-enhancing fact or an element — necessarily "def[ies] analysis by harmless error standards." *Fulminante*, 499 U.S. at 309. On the contrary, the Court has held that *Apprendi* errors may be reviewed for plain and harmless error, both of which require a showing of prejudicial effect. *United States v. Cotton*, 535 U.S. 625, 631 (2002); *Mitchell v. Esparza*, 540 U.S. 12 (2003).

III. Many states review jury instructions that omit or misdescribe an element for harmlessness under *Neder*. If the Washington Supreme Court is affirmed, those states will be forced to conclude that an omission of an element from jury instructions requires automatic reversal, even if the element is uncontroverted, supported by overwhelming evidence, or otherwise harmless beyond a reasonable doubt.

ARGUMENT

I. The Washington Supreme Court's Decision Casts Serious Doubt On *Neder v. United States*.

At first glance, the issue in this case seems limited to the propriety of sentences above the "prescribed statutory maximum" that are based on judicial factfinding. See *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (the "prescribed statutory maximum" sentence for Sixth Amendment purposes "is not the maximum a judge may impose after finding additional facts, but the maximum he may impose without any additional findings"). However, *Blakely* and the Court's other recent Sixth Amendment cases equate sentence-enhancing facts with elements of an offense

for purposes of the right to jury trial. Therefore, if the absence of a jury finding of a sentence-enhancing fact can never be harmless error, the absence of a jury finding on an element cannot be harmless, either — contrary to the holding in *Neder v. United States*, 527 U.S. 1 (1999).

A. Sentence-Enhancing Facts Are Functionally Equivalent To Elements For Purposes Of The Sixth Amendment's Jury Trial Guarantee.

"Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum punishment authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker*, 542 U.S. 220, 125 S.Ct. 738, 756 (2005); see also *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

At the center of these "*Apprendi* cases" is a "relatively new trend" in sentencing, *Booker*, 542 U.S. 220, 125 S.Ct. at 751, in which judges find facts about the offense or offender that increase or enhance the penalty beyond the maximum set for the "generic offense" — *i.e.*, the maximum available based solely on the elements exactly as described in the relevant statute. *Id.* at 751-52. *Apprendi* and its progeny reason that for purposes of the Sixth Amendment's jury trial guarantee, a sentence-enhancing fact is the "functional equivalent" of elements of an offense greater than the one charged. *Apprendi*, 530 U.S. at 494 n.19. Therefore, failure to submit such facts to the jury violates an "ancient guarantee" that the "truth of every accusation" necessary to a particular punishment "should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours ...." *Id.* at 477 (quotation omitted); see also *id.* at 478 (the Framers of the Constitution drew no distinction between an element of an offense and fact that

increases its maximum punishment); *Booker*, 542 U.S. 220, 125 S.Ct. at 751-52.

B. The Sixth Amendment Violation In This Case Was Harmless Under *Neder v. United States*.

The *Apprendi* line of cases does not, however, always require vacation of a sentence that rests upon a fact determined in violation of the Sixth Amendment. In fact, the Court has held that a jury's failure to determine *an element of the offense* due to an instructional omission or misdescription can be harmless when it does not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 8, 15, 19 (1999). That standard is met when the "missing" element is uncontested and supported by overwhelming evidence. *Id.* at 17.

If a jury's failure to determine *an element* can be harmless under *Neder*, then a jury's failure to determine *a sentence-enhancing fact* can be harmless, too. They are, after all, functional equivalents. *See, e.g., State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005) (*Apprendi* error is analogous to *Neder* error); *State v. Allen*, 615 S.E.2d 256, 275-80 n.10 (N.C. 2005) (Martin, J., concurring in part and dissenting in part) (same); *Hughes v. State*, 901 So.2d 837, 844 (Fla. 2005) (same); *People v. Prieto*, 66 P.3d 1123, 1143 (Cal. 2003) (same); *United States v. Swatzie*, 228 F.3d 1278, 1283 (11th Cir. 2000), *cert. denied*, 533 U.S. 953 (2001) (same).

In this case, the jury did not determine a sentence-enhancing fact — namely, the specific type of deadly weapon with which the defendant was armed during the assault. JA at 9, 12, 13. It is obvious, however, that the absence of a jury finding on that narrow question is harmless under *Neder*. The relevant count alleged that the defendant assaulted the victim with a deadly weapon, "to wit: a handgun." JA at 2. Moreover, the jury found that the

defendant was armed with a deadly weapon during the assault, JA at 6, 9, 12, and there was no evidence that the defendant used any other kind of weapon during the assault. JA at 34-35; Pet. at 2; Reply at 1-2. In fact, the defense did not contest that the defendant was armed with a gun during the assault. At the instruction conference, the trial court noted that it was "undisputed" that the deadly weapon involved was a gun, and defense counsel did not disagree. JA at 15-16, 24. Defense counsel even requested an instruction containing a specific definition of "firearm" and argued that "aiming a firearm" should be submitted to the jury as a lesser-included offense. JA at 16-17, 18, 19-23, 25. In addition, defense counsel repeatedly argued in closing that the gun the defendant was holding immediately after the assault was the deadly weapon referred to in the charge. Pet. at 4. The defense also admitted in a posttrial hearing that defendant's use of a firearm had been "pleaded and argued ... and evidently, perhaps obviously, proven to the jury." JA at 36. Just as in *Neder*, the evidence that the defendant was armed with a firearm was uncontested and overwhelming. The jury would not have found otherwise had it been instructed to determine whether the defendant was armed with a "firearm" instead of a "deadly weapon." See *State v. Recuenco*, 2003 WL 21738927 (Wash. App. 2003) (unpublished), *rev'd*, 100 P.3d 188 (Wash. 2005); see also *State v. Montgomery*, 759 A.2d 995, 1022 and n.47 (Conn. 2000) (jury's conviction on a count alleging that defendant killed the victim with a firearm arguably included a finding on sentence-enhancing fact that defendant used a firearm) (dictum).

In fact, the error here was less serious than the one in *Neder*. In *Neder*, the instructions completely omitted the factual issue. Here, by contrast, the instructions did *not* completely omit the sentence-enhancing fact. Instructions 8, 9 and 18 required the jury to determine whether the defendant assaulted the victim with a deadly weapon. They

also informed the jury that "deadly weapons" included firearms, but did not mention any *other* kind of deadly weapon. JA at 7-8. Therefore, the jury was asked to find whether the defendant was armed with a "deadly weapon" during the assault, but "firearm" was the only deadly weapon of which it was aware. Unlike *Neder*, then, this case does not involve the complete removal of an essential fact from the jury. The evidence supported only the existence of a firearm; the error here was that the special verdict form only permitted the jury to *communicate* that the defendant was armed with a "deadly weapon," rather than the specific deadly weapon established by the evidence. Although the jury finding on the sentence-enhancing fact here was *imprecise*, it was not *absent*. This is hardly the case in which to overrule *Neder* and reverse course on the road of common-sense appellate review.

If the Washington Supreme Court is correct, then the omission of a sentence-enhancing fact from jury instructions cannot be harmless. Because sentence-enhancing facts and elements are "functional equivalents" for purposes of the Sixth Amendment jury trial guarantee, upholding the Washington Supreme Court would be the functional equivalent of overruling *Neder*.

II. Nearly A Century Of Legal Reasoning Weighs Against Overruling *Neder v. United States*.

"Given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial." *United States v. Hasting*, 461 U.S. 499, 598-99 (1982); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("the Constitution entitles a criminal defendant to a fair trial, not a perfect one"). When a jury fails to determine an essential fact that is uncontested and

supported by overwhelming evidence (because it was not asked to do so), a second trial may be closer to perfect, but does not measurably increase the fairness or reliability of the verdict over the first trial. Yet the Washington Supreme Court still demands that second trial.

A. Jury Verdicts Obtained After Fundamentally Fair Adversarial Testing Should Not Be Reversed Unless An Error Contributed To The Result.

Until the early twentieth century, American courts routinely reversed criminal convictions based on "trivial technical errors." *See generally*, *State v. Allen*, 615 S.E.2d 256, 275 (N.C. 2005) (Martin, J., concurring in part and dissenting in part) (citation omitted). Beginning in 1919, however, a federal statute required courts to review convictions "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." *See United States v. Lane*, 474 U.S. 438, 448 (1986) (quoting 28 U.S.C. § 391 (1925-26 ed.)); *see also id.* at 454 (Brennan, J., concurring in part and dissenting in part). This statute evolved into both the federal harmless error statute, 28 U.S.C. § 2111, and the federal harmless error rule, Fed. R. Cr. P. 52(a). *Kotteakos v. United States*, 328 U.S. 750, 757 n.9 (1946); *Lane*, 474 U.S. at 448; see also *id.* at 454 (Brennan, J., concurring in part and dissenting in part).

Nearly sixty years ago, this Court interpreted the harmless error statute to bar reversals for errors that did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776. The error in that case, however, was not a constitutional one, *Lane*, 474 U.S. at 446, and the Court left open the door for argument that the statute did not apply to constitutional errors. *Kotteakos*, 328 U.S. at 764-65.

That door closed in 1967, when the Court held that there were at least some constitutional errors that are "so unimportant and insignificant" in the context of the entire trial that they could be deemed harmless. *Chapman*, 367 U.S. at 22. Noting that all fifty states had enacted "harmless error" rules or statutes, *id.* at 20, the Court observed that such rules served the "very useful" purpose of preserving convictions involving "small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Id.* at 22. The Court went on to hold that: (1) it is the prosecution's burden to establish the harmlessness of a constitutional error "beyond a reasonable doubt"; and (2) such an error is harmless when it "did not contribute to the verdict." *Id.*

Under *Chapman*, whether an error "affects substantial rights" and therefore requires reversal is not determined by a "process of classification whereby some rights are deemed substantial and ... automatically reversible." *Lane*, 575 U.S. at 455-56 (Brennan, J., concurring in part and dissenting in part). Rather, an error "affects substantial rights" only when it "affect[s] the fairness of the trial ... by calling into question the reliability of the result." *Id.* Since *Chapman*, the Court has repeatedly stressed that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," that constitutional errors can be harmless "in terms of their effect on the factfinding process at trial," *Van Arsdall*, 475 U.S. at 681, and that the "thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments." *Rose v. Clark*, 478 U.S. 570, 578 (1986). Therefore, appellate courts should focus on "the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) (quoting *Van Arsdall*, 475 U.S. at 681). Where the record establishes guilt beyond a reasonable doubt, "the interest in fairness has been

satisfied and the judgment should be affirmed." *Rose*, 478 U.S. at 578. In this way, appellate courts "conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error." *Hasting*, 461 U.S. at 508-09 (citation omitted).

In accordance with these principles, the Court has applied harmless error to a "wide range of errors," *Fulminante*, 499 U.S. at 306 (collecting cases), including instructions that directed the jury to presume an element based on the existence of predicate facts. *See, e.g., California v. Roy*, 519 U.S. 2 (1996); *Carella v. California*, 491 U.S. 263 (1989) (instruction that intent to steal must be inferred from failure to return rental property could be harmless); *Rose*, 478 U.S. at 575, 579-80, 581-82 (1986) (although jury was erroneously instructed to presume malice from the fact of the killing, the evidence of malice was "overpowering").

In 1999, the Court extended the reasoning of these cases to jury instructions that completely omitted an element of the offense. *Neder v. United States*, 527 U.S. 1 (1999). There, the trial court, rather than the jury, determined that misstatements on the defendant's tax returns were "material." This was error under *United States v. Gaudin*, 515 U.S. 506 (1995). But because there was overwhelming evidence that the misstatements were material, and the defendant was unable to contest their materiality, this Court concluded that the jury would surely have found the misstatements to be material had it been asked to consider the issue. *Id.* at 8-15. Under these circumstances, reversal was pointless because the materiality element would be uncontested in a retrial. *Id.* at 15.

B. The Error In This Case Falls Far Outside The Class Of "Structural Errors."

There are some rights whose violation cannot be considered harmless under any circumstances. *Lane*, 474 U.S. at 461 n.2 (Brennan, J., concurring in part and dissenting in part). However, those rights are "so basic to a fair trial," *id.*, that a violation warps the "framework within which the trial proceeds," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), and "necessarily render[s] the trial fundamentally unfair" such that it "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577 (1986). Although the Sixth Amendment's jury trial right serves important values, the Court has never held that its violation always renders the trial an unreliable mechanism for establishing guilt.

1. Structural Errors So Distort the Framework Of Trial As To Render It An Unreliable Mechanism For Determining Guilt.

Although *Chapman* held that constitutional error could be harmless, it also identified some rules "so basic to a fair trial that their infraction can never be treated as harmless error." *Lane*, 474 U.S. at 461 n.2 (Brennan, J., concurring in part and dissenting in part) (until *Chapman*, harmless error "was considered inapplicable" to constitutional errors). *Chapman* identified three such errors. *Id.*, 386 U.S. at 23 n.8 (citing *Payne v. Arkansas*, 356 U.S. 560 (1958) (admission of an involuntary confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of the right to counsel); and *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial before a partial judge)). Two of these three errors, plus four more announced in the thirty-eight years since *Chapman*, constitute a class of "structural errors" that "defy analysis by

'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (erroneous admission of involuntary confession is not structural error); *Johnson v. United States*, 520 U.S. 461, 468 (1997) (four errors have been added to the structural errors identified in *Chapman*: (1) exclusion of members of the defendant's race from the grand jury; (2) the right to self-representation at trial; (3) denial of the right to a public trial; and (4) a reasonable doubt instruction that misdescribes the burden of proof) (citations omitted). Sixth Amendment violations of the type in *Neder* and this case are not in this "very limited" class of errors. *Johnson*, 520 U.S. at 468.

a. The Sixth Amendment Jury Trial Guarantee Was Not Grounded On A Belief That An Unbiased Judge Is Inherently Less Likely To Arrive At The Truth Than An Unbiased Jury.

Apprendi and its progeny view the Sixth Amendment's jury trial right as a reservation of power in the people. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely*, 542 U.S. at 306. Also, the right to jury trial "guard[s] against a spirit of oppression and tyranny on the part of rulers" and is "the great bulwark of our civil and political liberties." *Apprendi*, 530 U.S. at 477; see also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (right to jury trial is an "inestimable safeguard against the corrupt or overzealous prosecutor and ... the compliant, biased or eccentric judge"); *id.* at 155-56 and n.23. *Apprendi* and its progeny then reason that the jury trial right fully protects the accused against these evils only when it encompasses the prerogative of submitting to a jury, rather than a judge or judges, the determination of each fact necessary to the imposition of a particular punishment. *Apprendi*, 530 U.S. at 477; see also *Booker*, 542 U.S. 220,

125 S.Ct. at 756; *Blakely*, 542 U.S. at 306-07. That entitlement "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 306.

Although the right to jury trial is a critical protection against "arbitrariness and repression" by the government's criminal justice machine, *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), the Court has not viewed the right as a protection against an inherent tendency of fair and neutral judges to make more mistakes in ascertaining the "truth of every accusation" against the defendant than unbiased lay citizens. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 607 (2002) ("The Sixth Amendment jury trial right ... does not turn on the relative rationality, fairness, or efficiency of potential factfinders"). For every argument that juries return more reliable verdicts than judges, there is an opposing argument. *Schriro*, 542 U.S. at 356; *Duncan*, 391 U.S. at 256-57. That long and evenly-matched debate is one reason why it is "implausible that judicial factfinding so *seriously* diminishe[s] accuracy as to produce an impermissible large risk of injustice." *Schriro*, 542 U.S. at 356 (emphasis in original); see also *United States v. Sanders*, 247 F.3d 139, 149 (4th Cir.) (shifting determination of an element (or sentence-enhancing fact) from judge to jury does not result in more accurate determinations), *cert. denied*, 534 U.S. 1032 (2001); *Bilzerian v. United States*, 127 F.3d 237, 241 (2d Cir. 1997). In fact, when the Court extended the jury trial right to state trials, it recognized that judicial factfinding is not inherently less fair to the defendant than a jury trial. *Duncan*, 391 U.S. at 158; see also *DeStefano*, 392 U.S. at 633-34. Just five months after *Duncan*, the Court said that the values underlying the jury trial right "would not measurably be served" by applying *Duncan* retroactively to convictions that were final when it was announced. *DeStefano*, 392 U.S. at 634.

It is true that both *DeStefano* and *Schriro* were retroactivity cases, and that the modern test for retroactive application of new constitutional rules of procedure is more stringent than the test for whether an error is "structural." *Tyler v. Cain*, 533 U.S. 656, 666 and n.7 (2001). They are important here, though, because they acknowledge that nobody knows whether juries are more accurate finders of facts. We simply cannot say that an unbiased judge's determination of a fact necessary to the punishment imposed — be it an element or sentence-enhancing fact — makes the determination inherently less reliable than if a jury had determined it. The Sixth Amendment was intended as a protection against abuse and arbitrariness, not inaccuracy.

b. An Instructional Omission Or Misdescription Does Not Distort The Entire Framework Of The Trial.

The common thread in the Court's "structural error" cases is that the violations were "structural defects in the constitution of the trial mechanism" that "infect" the "entire conduct of the trial from beginning to end." *Fulminante*, 499 U.S. at 310; *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). They are violations of such basic protections, and are so serious, that they distort "the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 310, and "necessarily render the trial fundamentally unfair" such that it "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577.

Structural errors differ markedly from "trial errors" — that is, errors arising "during the trial process itself." *Fulminante*, 499 U.S. at 307. In contrast to structural errors, trial errors alter the way in which the case is presented to the jury, and "may therefore be quantitatively assessed in the

context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08; see also *Van Arsdall*, 475 U.S. at 677-78, 684 (denial of cross-examination is not reversible *per se*; a reviewing court "should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process...").

Structural errors "are the exception, not the rule." *Hasting*, 461 U.S. at 509. In fact, this Court has identified only six, *Johnson*, 520 U.S. at 468 (citations omitted), and has said that "if the defendant has counsel and was tried by an impartial adjudicator, there is strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. The class of rules that are so fundamental to a fair trial that violations thereof "seriously diminish[]" the likelihood of an accurate conviction is "extremely narrow," and it is "unlikely that any [such rule] has yet to emerge." *Schriro*, 542 U.S. at 352 (citations omitted). And, although the Court has added new members to that class on occasion, it has arguably expelled others. See *Fulminante*, 499 U.S. at 308-09 (rejecting the argument that under *Payne v. Arkansas*, 356 U.S. 560 (1958), admission of an involuntary confession cannot be reviewed for its impact on the verdict).

Fourth Amendment violations are not structural. *See, e.g., Stone v. Powell*, 428 U.S. 465, 488 (1976) ("the policies behind the exclusionary rule are not absolute, [but] must be evaluated in light of competing policies"; federal habeas relief for alleged Fourth Amendment violations is unavailable if the prisoner has an opportunity for full and fair litigation thereof in state court). Neither are Fifth Amendment violations. *See, e.g., Chapman*; *Fulminante*, 499 U.S. at 310-11. *Neder* firmly established that instructional omissions or misdescriptions do not rise to the level of structural error. 527 U.S. at 8-15, 18.

2. An Instructional Omission or Misdescription Is Different From An Instruction That Permits The Jury To Make Factual Findings On Evidence Less Certain Than "Beyond A Reasonable Doubt."

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the reasonable doubt instruction was unconstitutionally defective because it permitted conviction upon evidence less certain than "beyond a reasonable doubt." *Id.* at 277, 280. The Court held that the error could not be reviewed for harmlessness because such review assumes that the jury found guilt "beyond a reasonable doubt," and then asks whether that verdict would have been the same without the error. *Id.* at 279. In *Sullivan*, the faulty reasonable doubt instruction prevented the jury from returning a "verdict" within the meaning of the Sixth Amendment. *Id.* at 280.

In *Neder*, the dissent argued that there is no constitutional difference between the absence of a jury finding on *all* elements, as in *Sullivan*, and the absence of a jury determination on *one* element, as in *Neder*. *Neder*, 527 U.S. at 33 (Scalia, J., dissenting). Moreover, to say that the omission or misdescription of a fact issue in jury instructions is harmless requires appellate judges, rather than the jury, to conclude that the missing element was proved beyond a reasonable doubt — the very procedure against which the Sixth Amendment was intended to protect. *Id.* at 31-40 (Scalia, J., dissenting).

In *Neder*, a majority of this Court acknowledged that this argument was not "illogical," 527 U.S. at 15, but concluded that it was unpersuasive for two reasons that also apply here.

a. *Neder*, Like This Case, Did Not Involve A Total Deprivation Of The Right To A Jury Trial.

First, in *Sullivan*, the error "vitiated *all* the jury's findings." 508 U.S. at 281 (emphasis in original). Put differently, the defective reasonable doubt instruction in *Sullivan* prevented the factfinding body *from acting as a jury*, because it had been told that it could convict while still maintaining a reasonable doubt. The factfinding body could have been called a review board or a star chamber, but it was not a Sixth Amendment *jury*. Thus, the defendant suffered a total deprivation of the jury trial right. The error could be harmless only if *appellate judges* functioned as the jury. *Id.* at 279.

In *Neder* and in this case, by contrast, a properly selected factfinding body determined facts beyond a reasonable doubt, thereby functioning as a Sixth Amendment jury. Although an instructional error prevented the jury from returning a precise finding on a factual issue, the defendant was not completely deprived of the protections that the Sixth Amendment provides. See *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (*per curiam*) (*Neder* "explicitly distinguished" *Sullivan* because the error in that case 'vitiated all the jury's findings,' whereas the trial court's failure to instruct the jury on one element did not") (quoting *Neder*, 527 U.S. at 11); see also *State v. Garrison*, 40 S.W.3d 426, 434 (Tenn. 2000) (omission of element from jury instructions was not structural error because "the integrity of the jury as a fact-finding body was not disturbed"). Moreover, the absence of a finding on an element does not taint the findings that the jury did make, or relegate the factfinding body to less-than-Sixth-Amendment status. For these reasons, *Sullivan* does not prevent a reviewing court from asking whether the jury's conclusions would have been different absent the error. *Neder*, 527 U.S. at 10-15.

b. The Cost Of Applying *Sullivan* to An Instructional Omission Or Misdescription Is Too Great.

The *Neder* majority also rested upon the maxim that "the life of the law has not been logic, but experience." *Neder*, 527 U.S. at 15 (quoting O. Holmes, The Common Law 1 (1881)). Choosing to "stand back" for a broad view of what extending *Sullivan* to the facts before it would accomplish, *Neder*, 527 U.S. at 15, the majority concluded that the cost of extending *Sullivan* to cases in which the missing element had been uncontested, was supported by overwhelming evidence, and would not be contested on retrial, simply outweighed the benefit of retrying the case. *Neder*, 527 U.S. at 15. There was no point, it said, in retrying a case involving *Neder* error when the retrial would not focus on the missing element, but on the elements that were contested before, and upon which the jury was properly instructed the first time around. *Id.* The same reasoning governs here. See Argument III, *infra*.

3. Nothing In *Apprendi* Or Its Progeny Undermines *Neder*.

Apprendi and its progeny recognized that the primary purpose of the jury trial right was to thwart arbitrariness and oppression. See pp. 14-16, *supra*. However, the *Apprendi* cases do not say that juries return more reliable verdicts than judges. *See, e.g., Duncan, supra.* If the fundamental purpose of a criminal trial is to decide fairly the factual question of the defendant's guilt or innocence, *Rose*, 478 U.S. at 577, and a jury's failure to determine a single undisputed element (or sentence-enhancing fact) does not seriously undermine either the fairness or the accuracy of that determination, *Neder*, *supra*, then justice has been done. An appellate court may not require a do-over just to take another shot at the unattainable "perfect" trial. *See, e.g., United States v. Hasting*, 461 U.S. 499, 598-99 (1983)

("there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial"); *Fulminante*, 499 U.S. at 308 ("immaterial error" is "virtually inevitable" in every criminal trial).

It is no surprise, then, that the Court has already rejected the argument that *Apprendi* error is structural. See *United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Booker*, 542 U.S. 220, 125 S.Ct. 738 (2005); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Cotton*, the indictment did not charge, and the jury did not determine, a sentence-enhancing fact. 535 U.S. at 632. But the Court concluded unanimously that the error did not require reversal, because the enhancing fact was supported by "overwhelming and uncontroverted" evidence. *Id.* at 634. The Court concluded that the greater threat to the "fairness, integrity and public reputation of judicial proceedings" was vacating the enhanced sentence, not the original Sixth Amendment error. *Id.* As with *Neder*, the cost of reversing every *Apprendi* error does not outweigh any small gain in fairness.

Mitchell involved Ohio law, under which a defendant must be a "principal offender" in a murder during an aggravated robbery to be eligible for the death penalty. 540 U.S. at 14 n.1 (citation omitted). The murder charge did not allege, and the jury did not find, that the defendant was a "principal offender" in the robbery and murder of a store clerk. *Id.* at 14. An Ohio appellate court concluded, however, that strict compliance with the statute was unnecessary when the defendant is the only person charged with the robbery/murder. *Id.* In habeas proceedings, lower federal courts vacated the death sentence, holding that failure to comply with the statute was the "functional equivalent" of the error in *Sullivan*. *Mitchell*, 540 U.S. at 16. This Court reversed, holding that the absence of the "principal offender"

allegation (and jury finding) was analogous to *Neder* error. Therefore, the Ohio State court reasonably concluded that *Apprendi* errors are not "structural" but rather subject to a harmless error analysis. *Id.* at 18-19.

In *Booker*, this Court invalidated the United States Sentencing Guidelines to the extent that they mandated shifted sentence ranges based on judicially-determined facts. However, the Court predicted that its decision would not require many new sentencing hearings because appellate courts must still apply "ordinary prudential doctrines," including "whether the issue was raised below" and whether it "fails the 'plain error' test." 542 U.S. 220, 124 S.Ct. at 769. Put differently, *Apprendi* errors in federal sentences will be reviewed for harmlessness if preserved, *Neder*, 527 U.S. at 7, or for plain error if unpreserved. *Cotton*, 535 U.S. at 631; *United States v. Olano*, 507 U.S. 725, 731-34 (1993). Both standards involve a review of the record for any prejudicial effect on the result. *United States v. Dominguez-Benitez*, 524 U.S. 74, 81 (2004) (except for structural errors, relief for error "is tied in some way" to prejudicial effect on the outcome of a proceeding). Although the *Booker* Court was divided over several issues, it was not divided on this point.

Finally, in *Ring*, the Court applied *Apprendi* to invalidate a death sentence. The Court declined to reach the State's harmless error argument, but only because harmlessness determinations are normally left for lower courts. *Ring*, 536 U.S. at 609 n.7. The Court's remand for proceedings "consistent with" its opinion signaled that *Apprendi* errors are not structural.

III. Affirmance Imposes The Burden Of Retrying Cases In Which Instructional Error Would Have Been Harmless Under *Neder* And Permits States To Enlarge The Class Of Structural Errors.

If the Washington Supreme Court is upheld, *Apprendi* errors effectively become structural errors. This would be an abrupt about-face for eight States that expressly apply *Neder* to hold that a jury's failure to determine a sentence-enhancing fact can be harmless. In addition, many States expressly apply *Neder* to uphold convictions despite omissions or misdescriptions of elements. Affirming the decision below threatens not only the "settled expectations" of these States, *Ring*, 536 U.S. at 613 (Kennedy, J., concurring), but also a number of other State rules similar to, but developed independently from, *Neder*. The dockets of State courts will balloon with retrials whose result is either practically predetermined (if the same witnesses and evidence are introduced), *Neder*, 527 U.S. at 15, or acquittal (if witnesses have become unavailable or evidence is lost).

There is also the potential that states will interpret an affirmance here as redefining structural error. If an instructional omission or misdescription is structural error even though there is no reasonable doubt that a properly instructed jury would have found the missing fact, then structural error is no longer limited to error warranting a presumption that the result is unreliable. Rather, States may hold that structural errors include violations of rights that do not serve to ensure an accurate determination of the truth.

A. The Impact Of Overruling *Neder* On State Criminal Dockets Will Be Substantial.

1. Many States Expressly Apply *Neder* To *Neder* and *Apprendi* Errors.

At least eight States have expressly applied *Neder* to *Apprendi* errors. *See, e.g., State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005); *People v. Thurow*, 786 N.E.2d 1019, 1026 (Ill. 2003); *State v. McDonald*, 99 P.3d 667, 669-70 (N.M. 2004).[1] A turn-about in most of these States will affect many individual sentences. California, for example, has applied *Neder* to uphold twenty-six sentences resting on facts determined in violation of the Sixth Amendment. *See, e.g., People v. Prieto*, 66 P.3d 1123, 1143 (Cal. 2003).

The burden of resentencing every defendant whose punishment rests on an *Apprendi* error, however, pales in comparison to the impact of overruling *Neder*.

Twenty States, including Washington and Colorado, have expressly applied *Neder* in concluding that instructional omissions or misdescriptions can be harmless. *See, e.g., State v. Brown*, 58 P.3d 889, 895 (Wash. 2002); *Griego v. People*, 19 P.3d 1, 8 (Colo. 2001). See Appendix. Four others — Arizona, Illinois, Maine and New Mexico — have applied *Neder* to sentence-enhancing facts. *Thurow, supra*; *Henderson, supra*; *McDonald, supra*; *State v. Burdick*, 782 A.2d 319, 327-29 (Me. 2001). At least two other States have suggested that *Neder* applies to instructional omissions or misdescriptions. *State v. Warren*, 608 N.W.2d 618, 622-23 (Neb. App. 2000); *State v. Sprattling*, 55 P.3d 276, 284-85 (Hawaii 2002). It is fair to say, then, that at least twenty-six

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[1] See also *State v. Montgomery*, 759 A.2d 995, 1022 (Conn. 2000); *State v. Lovelace*, 90 P.3d 298, 304 (Idaho 2004); *Cauthern v. State*, 145 S.W.3d 571, 623-24 (Tenn. Crim. App. 2004); *State v. Aplaca*, 25 P.3d 792, 799-802 (Hawaii 2001).

states apply *Neder* to instructional omissions or misdescriptions. Some of the States applying *Neder* have overruled state cases in doing so. See Appendix.

Overruling *Neder* will substantially lengthen the criminal dockets in many of these States. In California, courts have upheld sixty-three convictions despite *Neder* error. Washington courts have applied *Neder* forty-seven times to uphold convictions or enhanced sentences.

2. Overruling *Neder* Threatens Several State Rules That Parallel *Neder*.

Several States hold that failure to instruct on an element may be harmless under *Chapman* without relying on *Neder*. *See, e.g., People v. Crimmins*, 326 N.E.2d 787, 791 (N.Y. 1975) (adopting *Chapman*); *People v. Rodriguez*, 764 N.Y.S.2d 301, 302-03 (A.D. 2005) (failure to define "sexual contact" was harmless under *Crimmins*). New York appellate courts have upheld convictions in ten cases despite *Neder* error. Texas reviews instructional omissions and misdescriptions for "egregious error" if unpreserved, or "some error" if preserved. See *Almanza v. State*, 724 S.W.2d 805 (Tex. Cr. App. 1987). It has upheld thirty-one convictions or sentences since *Almanza*, and several more under pre-*Almanza* standards. *See, e.g., McKnight v. State*, 287 S.W.2d 150 (Tex. Cr. App. 1956). The impact of holding that instructional omissions or misdescriptions are structural errors extends well beyond the States that expressly apply *Neder*.

3. If *Neder* Error Is Structural, States May Reverse For Unpreserved *Neder* Errors.

The *Neder* majority noted that its ruling would apply to "misdescribed" elements as well as "clear cut" omissions. 527 U.S. at 14. A *per se* reversal rule, the Court observed, would require reviewing courts to determine "just how

serious" a misdescription had to be before it constituted structural error. *Id.* That would be difficult enough with the "ample volume" of federal crimes, but would be "measurably compounded" by habeas petitions for relief from state convictions. *Id.*; see also *id.* at 39 (Scalia, J., dissenting). Therefore, the Court wrote, "[W]e are entitled to stand back and see what would be accomplished" by extending *Sullivan* to instructional omissions and misdescriptions. *Id.* at 15.

In answering this concern, the *Neder* dissent argued that instructional omissions or misdescriptions required automatic reversal "only when [a] specific objection has been made and rejected." *Neder*, 527 U.S. at 39 (Scalia, J., dissenting). Otherwise, such errors are subject to plain error review, which is similar to ordinary harmless error review. *Neder*, 527 U.S. at 34-36, 39 (Scalia, J., dissenting); see also *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 n.7 (2004). Therefore, applying *Sullivan* to such defective instructions would not require a significant number of retrials. *Neder*, 527 U.S. at 39 (Scalia, J., dissenting).

The *Neder* dissent might be correct insofar as direct appeals from federal convictions are concerned. The situation in State courts, however, is not as clear-cut. In fact, if the Washington Supreme Court is affirmed, States may conclude that *Neder* errors require reversal *regardless of whether they are preserved.*

On one hand, this Court has said that structural error requires reversal without a review for its *actual* effect on the outcome, because such effects are "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 281. Also, structural errors are so "intrinsically harmful" that searching for actual impact is unnecessary. *Neder*, 527 U.S. at 7; see also *id.* at 8-9; *Fulminante*, 499 U.S. at 309-10. Moreover, the Court does not determine whether an error is structural on a case-by-case basis; "a constitutional error is

either structural or it is not." *Neder*, 527 U.S. at 14. In fact, Justice Stevens has argued that if an error always renders a trial fundamentally unfair, it warrants retrial even if unpreserved. *Neder*, 527 U.S. at 28 (Stevens, J., concurring in part and concurring in the judgment).

On the other hand, the Court has declined to hold that an instructional omission is structural, partly because the error was *unpreserved*. See *United States v. Cotton*, 535 U.S. 625 (2002); *Johnson v. United States*, 520 U.S. 461 (1997). In both cases, the Court rejected the claim that an instructional omission was structural error. *Cotton*, 535 U.S. at 632, *Johnson*, 520 U.S. at 463. The seriousness of an alleged error, it held, "does not remove consideration of it from the ambit of [the plain error standard]." *Johnson*, 520 U.S. at 466; see *Cotton*, 535 U.S. at 632, 633 (citing *Johnson*). In both cases, the omission did not rise to the level of plain error. *Cotton*, 535 U.S. at 632-33, *Johnson*, 520 U.S. at 469. According to these cases, then, *even if an error in a criminal trial might have been structural, it may not require reversal on direct appeal if unpreserved.* See also *Dominguez-Benitez*, 542 U.S. at 81.

If the Washington Supreme Court is affirmed, there is no guarantee that States will follow the *Cotton-Johnson* line of reasoning. States may conclude *either* that (1) a defendant can forfeit an *Apprendi* or *Neder* error, even though it is structural; or (2) that *Apprendi* and *Neder* errors require reversal regardless whether the defendant preserves them. *See, e.g., Martin v. State*, 2005 WL 2811737 at *5 (Md. App. 2005) (structural error requires reversal even if the defendant failed to preserve it) (citing *Sullivan*); *State v. Hill*, 749 N.E.2d 274, 282 (Ohio 2001) (whether unpreserved structural error requires reversal is "arguable").

In addition, States differ in their definition and application of standards of appellate review. For example, Iowa has no "plain error" rule, but has considered issues not

raised at trial if they were "tacitly" considered below or if it would be "expeditious" to review them. *State v. Yaw*, 398 N.W.2d 803, 805 (Ia. 1987). There is no telling how Iowa courts would react to a new structural error. Other States decline to apply plain error to constitutional errors at all. *See, e.g., State v. Mills*, 109 P.3d 415, 417, 421 n.7 (Wash. 2005) (unpreserved instructional omissions or misdescriptions are reviewed for harmlessness); *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005) (overruling prior decisions applying harmless error to unpreserved constitutional errors); *Griego*, 19 P.3d at 7-8. And, some State appellate courts may simply decline to address claims that an error is unpreserved. *See, e.g., People v. Hinojos-Mendoza*, 2005 WL 2561391 at *2 (Colo. App. 2005). Contrary to the view of the dissenters in *Neder*, then, affirming the Washington Supreme Court leaves States free to reverse even for unpreserved *Neder* error.

B. Affirming The Washington Supreme Court Would Permit States To Redefine Structural Error.

Structural errors warrant a presumption that the process by which the jury determines facts is so unfair that its findings are too likely to be incorrect. *See, e.g., Rose*, 478 U.S. at 577; *State v. Allen*, 615 S.E.2d 256, 278 (N.C. 2005) (Martin, J., concurring in part and dissenting in part). By affirming the Washington Supreme Court, however, the Court would mandate reversal even when the defendant *concedes* the missing fact (and therefore no presumption of unfairness or unreliability is warranted). This would mean that *all* impairments of the jury trial right are structural error — not because they warrant a presumption of unfairness or unreliability, but because they threaten "important values that are unrelated to the truth-seeking function of the trial." *Rose*, 478 U.S. at 588 (Stevens, J., concurring in the judgment). This contradicts the maxim that the reversibility of error does not depend on the *nature* of the right violated.

Lane, 575 U.S. at 455-46 (Brennan, J., concurring in part and dissenting in part).

States have already defined their own structural errors. *See, e.g., Hayes v. Commonwealth*, 2005 WL 2674967 at *8 (Ky. 2005) (precluding defense counsel from asking prospective jurors about the effect of defendant's choice not to testify); *State v. Jackman*, 104 P.3d 686, 690-91 (Wash. App. 2005) (instructions including victims' birthdates where victims' age was an element), *review granted*, 122 P.3d 728 (Wash. 2005); *State v. Brown*, 827 A.2d 346, 352 (N.J. Super. 2003) (allowing jury to read victim's testimony in the absence of trial judge). Affirmance in this case would suggest to the States that structural errors are not limited to those justifying a presumption of unreliability; that they may expand "structural error" to include violations of *any* right — even those that do not serve to enhance the fundamental fairness or reliability of the trial.

The result would be chaos. Some states might hold that a violation of the privilege against self-incrimination is structural. See *Rose*, 477 U.S. at 587-88 and n.4 (Stevens, J., concurring in the judgment) (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)); *Fulminante*, 499 U.S. at 288-295 (White, J., dissenting); *State v. Esquivel-Hernandez*, 975 P.2d 254 (Kan. 1999), *disapproved* in *State v. Swanigan*, 106 P.3d 39, 45 (Kan. 2005). Other States will review the erroneous admission of an involuntary confession for harmlessness. *Fulminante*, 499 U.S. at 310. Similarly, some States may decide that erroneous admission of uncharged misconduct evidence is structural error because its effect on the outcome is inherently "unquantifiable and indeterminate," *Sullivan*, 508 U.S. at 282, and the right to be tried only on the charged offense is "basic" to a fair trial. See *State v. Rodriguez*, 575 So.2d 1262, 1266 (Fla. 1991) (requiring bifurcated trial of prior convictions that raise the class level of an offense).

CONCLUSION

The harmless error rule arose out of "widespread and deep conviction" that appellate courts "'tower above [criminal trials] as impregnable citadels of technicality.'" *Kotteakos*, 328 U.S. at 759 (quotation omitted). The Court has often said that reversing for error that has no effect on the judgment "encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470. It also undermines the central purpose of a criminal trial — namely, deciding the "factual question" of guilt or innocence. *Rose*, 478 U.S. at 577. When a jury's failure to determine an element (or sentence-enhancing fact) does not undermine that function, the trial is fair and reliable. *Rose*, 478 U.S. at 578. *Apprendi* and its progeny do not justify reversing course on ninety years of common-sense appellate review, and the burden of correcting *Apprendi* error in *every* case may render courts "unavailable to redress prejudicial legal error." *Allen*, 615 S.E.2d at 288 (Martin, J., concurring in part and dissenting in part). The decision of the Washington Supreme Court should be reversed.

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APPENDIX

STATES EXPRESSLY APPLYING *NEDER* TO UPHOLD CONVICTIONS DESPITE THE OMISSION OR MISDESCRIPTION OF AN ELEMENT IN JURY INSTRUCTIONS:

Alabama:

Ash v. State, 843 So.2d 213, 218-19 (Ala. 2002).

Arkansas:

Sasser v. State, 993 S.W.2d 901, 906 - 907 (Ark. 1999) (distinguishing *Sullivan v. Louisiana*).

California:

People v. Cole, 17 Cal.Rptr.3d 532, 573-74 (Cal. 2004).

Colorado:

Griego v. People, 19 P.3d 1 (Colo. 2001) (disapproving cases holding that instructional omission or misdescription is structural error).

Connecticut:

State v. Gooden, 873 A.2d 243, 313 (Conn. App. 2005) (citing *State v. Montgomery*, 759 A.2d 995 (2000) (*Neder* applies to sentence-enhancing facts)).

District of Columbia:

Bellamy v. United States, 810 A.2d 401, 405-07 and n.8 (D.C. 2002).

Florida:

State v. Harbaugh, 754 So.2d 691, 694 (Fla. 2000).

Idaho:

State v. Hansell, 115 P.3d 145, 149 (Id. App. 2005) (citing *State v. Lovelace*, 90 P.3d 298, 304 (Idaho 2004) (*Neder* applies to jury's failure to determine death aggravators)).

Indiana:

Thomas v. State, 827 N.E.2d 1131, 1134-35 (Ind. 2005) (counsel not ineffective for failing to challenge absence of instructions on predicate felony underlying felony murder count, because defendant was convicted of another form of murder and absence of instructions was therefore harmless) (citing *Neder*).

Kansas:

State v. Daniels, 91 P.3d 1147, 1155, 1156 (Kan. 2004).

Michigan:

People v. Mass, 628 N.W.2d 540, 554 n.29 (Mich. 2001) (adopting *Neder* but finding that omission of drug quantity from conspiracy instruction was plain error).

Mississippi:

Kolberg v. State, 829 So.2d 29, 45-51 (Miss. 2002) (disapproving earlier cases holding that instructional omission or misdescription always requires reversal).

Nevada:

Collman v. State, 7 P.3d 426, 449 (Nev. 2000) (overruling *Thompson v. State*, 838 P.2d 452 (Nev. 2000)).

North Dakota:

State v. Flanagan, 680 N.W.2d 241, 243-45 (N.D. 2004).

Oklahoma:

Primeaux v. State, 88 P.3d 893, 908-09 (Okla. Crim. App. 2004).

Rhode Island:

State v. Golembewski, 808 A.2d 622, 624-25 (R.I. 2002).

Tennessee:

State v. Richmond, 90 S.W.3d 648, 657 (Tenn. 2002).

Virginia:

Emmet v. Warden, Sussex I State Prison, 609 S.E.2d 602, 605-06 (Va. 2005).

Washington:

State v. Brown, 58 P.3d 889, 895 (Wash. 2002).

Wisconsin:

State v. Harvey, 647 N.W.2d 189, 198-203 and n.10 (Wis. 2002) (overruling *State v. Leist*, 414 N.W.2d 45 (Wis. App. 1987)).

Supreme Court, U.S.
FILED
DEC 14 2005
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No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

vs.

ARTURO R. RECUENCO,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1) Is *Blakely* v. *Washington* subject to harmless error analysis?

2) Should the full retroactivity rule of *Griffith* v. *Kentucky* be modified?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case addresses the potential impact of *Blakely* v. *Washington*, 542 U. S. 296 (2004) on the criminal justice system. *Blakely* is already one of the most disruptive decisions ever to come from this Court, potentially threatening tens of

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

thousands of sentences. Allowing its rule to be ameliorated by harmless error analysis will save many sentences at no appreciable cost to the integrity of the *Blakely* rule. A decision upholding these otherwise valid sentences is consistent with the interests of public safety and justice which the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant, Arturo Recuenco, had become angry with his wife for not cooking for his relatives, so he smashed their stove, and threatened her with a gun. See *State* v. *Recuenco*, 154 Wn. 2d 156, 159, 110 P. 3d 188, 189 (2005). He was charged with second-degree assault, with a deadly weapon enhancement for using the gun. See *id.*, at 158, 110 P. 3d, at 189. Recuenco was also charged with interfering with domestic violence reporting and third-degree malicious mischief. *Id.*, at 159, 110 P. 3d, at 189.

The trial court gave the jury a special verdict form which asked " 'was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?' " *Ibid.* The prosecutor had never asked for a special verdict form, but the defense "proposed an identical one," to what the court submitted. See *id.*, at 159, 110 P. 3d, at 189-190.

A jury convicted Recuenco on all three charges and returned a verdict that he had been armed with a deadly weapon. *Id.*, at 160, 110 P. 3d, at 190. "The jury was not asked to, and therefore did not, return a special verdict that Recuenco committed the assault while armed with a firearm." *Ibid.* The base sentence for the assault count was three to nine months. See *ibid.* The deadly weapon enhancement would add a year to the base sentence while a firearm enhancement would add three years. See *ibid.* The prosecution asked for a three-month base term and a three-year enhancement for firearm use, but the defense objected to the enhancement, asserting that it had to be

pled and proven to a jury. See *ibid.* The trial court imposed the 39-month term requested by the prosecution, "reasoning that it had 'no discretion but to impose the statutorily mandated term with regard to the deadly weapon enhancement.' " *Ibid.* The sentences for the other counts were suspended. See *ibid.*

Recuenco appealed his conviction and sentence. One of his claims was that the enhancement violated due process because it was imposed without notice or a reasonable doubt finding by a jury. See *id.*, at 160-161, 110 P. 3d, at 190. The state intermediate appellate court affirmed Recuenco's conviction and sentence, finding that even if the enhancement violated *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), the error was harmless.[2] See *Recuenco*, *supra*, at 161, 110 P. 3d, at 190. After the initial appeal, *Blakely* v. *Washington*, 542 U. S. 296 (2004) was decided and subsequently the Washington Supreme Court granted review to determine the *Apprendi/Blakely* issue. See *Recuenco*, *supra*, at 161, 110 P. 3d, at 190. The Washington Supreme Court found *Blakely* error, and also held that *Blakely* error could never be harmless as it involved a violation of the defendant's right to a jury trial, based on its decision the same day in another case. See *id.*, at 164, 110 P. 3d, at 192 (citing *State* v. *Hughes*, 154 Wn. 2d 118, 110 P. 3d 192 (2005)).

This Court granted certiorari on October 17, 2005.

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2. The intermediate court also indicated that the error " 'appeared' " to be invited because the defense "proposed the special verdict form the [trial] court used asking the jury only to find the existence of a deadly weapon, not specifically a firearm." *Id.*, at 163, 110 P. 3d, at 191. The Washington Supreme Court rejected the People's invited error claim, holding that there was no invited error because the defense was only asserting what it believed to be the correct instruction for second-degree assault with a deadly weapon enhancement and that the defendant consistently objected to the trial court's imposition of the firearms enhancement. See *id.*, at 163-164, 110 P. 3d, at 191-192.

SUMMARY OF ARGUMENT

Whether error under *Blakely* v. *Washington* is subject to harmless error analysis is governed by examining *Neder* v. *United States*. *Neder* held that an instruction which allowed the judge rather than the jury to determine an element of the crime was susceptible to harmless error analysis. *Blakely* treats certain sentence enhancements like an element of the crime, making *Blakely* error no different than the type of error that *Neder* determined could be harmless. In light of *Neder*, *Sullivan* v. *Louisiana* cannot support a finding of structural error in this case.

This conclusion is consistent with the nature of *Blakely* and harmless error. Harmless error is the rule, and structural error is the exception, reserved for those errors that are *per se* prejudicial or which do not have any adverse effect on the trial. *Blakely* does not fit either category of structural error. *Blakely* is an extension of due process cases including *Mullaney* v. *Wilbur* and *Sandstrom* v. *Montana*, which are susceptible to harmless error analysis.

Applying harmless error to *Blakely* will mitigate the cost of full retroactivity under *Griffith* v. *Kentucky*. *Blakely* has caused unprecedented disruption of the criminal justice system. Most of the prior landmark criminal procedure cases were not applied retroactively on direct review. Retroactive application will make *Blakely* even more disruptive than cases like *Miranda* v. *Arizona* or *Mapp* v. *Ohio*. Jurisprudential concerns are a valid consideration in harmless error analysis, and *Blakely*'s disruptiveness is a reason to temper that decision with harmless error.

The full retroactivity rule of *Griffith* should be limited to cases of actual prejudice. *Griffith* was adopted to promote judicial integrity and to treat similarly situated defendants equally. This comes with an enormous penalty, an equal harshness to the victims of the guilty criminals who benefit from *Griffith*. Justice Harlan's writings, the basis for *Griffith*, recognize that the proper scope of retroactivity is limited by the

scope of necessity for the rule. Requiring prejudice for retroactivity will preserve the equal treatment of defendants where it is most useful, while minimizing *Griffith*'s considerable harm to the interests of victims and society. It would also treat defendants more equally, as currently only those with counsel prescient enough to anticipate the new rule will receive its full benefits. A prejudice requirement will not burden the courts, but will make cases more dependent upon their merits rather than counsel's anticipation of changes in the law.

ARGUMENT

I. *Blakely* error is subject to harmless error analysis under *Neder*.

This case addresses the extent of the disruption to the criminal justice system caused by *Blakely* v. *Washington*, 542 U. S. 296 (2004). *Blakely*, often described as creating a revolution in sentencing, see Mnookin, Uncertain Bargains: The Rise of Plea Bargaining in America, 57 Stan. L. Rev. 1721, 1736, n. 21 (2005), is having a profound impact on the administration of justice. Applying the harmless error doctrine to *Blakely* will ameliorate some of its more revolutionary consequences, while preserving the *Blakely* rule for genuine miscarriages of justice.

This case begins with a presumption that the error can be harmless. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U. S. 570, 579 (1986). The availability of harmless error is the norm for most constitutional criminal procedure. Indeed, "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U. S. 279, 306 (1991). "Structural" errors, which are not subject to harmless error analysis, are found "only in a very limited class of cases." *Johnson* v. *United States*, 520 U. S. 461, 468 (1997). This limited class of error typically involves error that fatally

compromises the entirety of the trial, see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased trial judge) or where the error's effect on the outcome of the trial cannot be readily identified. See *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) (racial discrimination in grand jury selection); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (no public trial). In both types, harmless error review would be unreasonable. Harmless error analysis is pointless when the type of error necessarily compromises the trial's fairness, as this type of error is so prejudicial it will never be harmless. The other structural errors, such as grand jury discrimination or the denial of self-representation, do not prejudice the defendant's chance to avoid a guilty verdict but instead violate another societal interest. In these cases, the error would always be harmless if subjected to an impact-on-the-trial test, effectively subverting the rule and compromising the other societal interest.

Blakely does not fit either form of structural error. *Blakely*, an application of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), requires the government to treat factors used to increase the sentence beyond the statutory maximum as an element of the crime to be proved beyond a reasonable doubt before the jury. See *Blakely*, 542 U. S., at 301. That decision centers on the state's authority to reclassify elements of the crime as sentencing factors. See *id.*, at 302, n. 6. In essence, *Blakely* and *Apprendi* are heirs of the idea that the state cannot manipulate the codes to avoid the due process requirement that every element must be proven beyond a reasonable doubt.

This principle was most prominently expressed in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). *Mullaney* dealt with a Maine law requiring the defendant to prove that he acted " 'in the heat of passion on sudden provocation' " to reduce murder to manslaughter. See *id.*, at 684-685. In holding that this violated the due process guarantee of *In re Winship*, 397 U. S. 358 (1970), this Court relied on the threat to the reasonable doubt

requirement posed by the manipulation of the definition of crimes.

> "Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of the punishment." *Mullaney*, *supra*, at 698.

Apprendi and *Blakely* address similar concerns. *Mullaney* demonstrated that *Winship*'s reasonable doubt requirement applied not only to the question of guilt or innocence, but to the consequences of a guilty verdict, see *Apprendi*, 530 U. S., at 485, which is an important link in the logical chain between *Winship* and *Apprendi*. *Apprendi* turns on the same principle found in *Mullaney*, that a state cannot avoid reasonable doubt or a jury trial by reclassifying an element of a crime as a factor that influences the consequences of a conviction. If a factor other than a prior conviction is to be used to increase the sentence from the statutory maximum, then it must be submitted and proven to the jury just like any other element of a crime. See *Apprendi*, 530 U. S., at 490.

The *Blakely* Court stresses that a sentencing factor which enhances the sentence beyond the statutory maximum is the same as an element of the crime.

> "Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean that a judge could sentence a man for committing murder even if the jury only convicted him of illegally possessing a firearm used to

commit it—or of making an illegal lane change while fleeing the scene." 542 U. S., at 306.

Errors of this sort are subject to harmless error analysis. While the error in *Mullaney* was so clearly prejudicial that harmless error analysis was out of the question in that particular case, see 421 U. S., at 705 (Rehnquist, J., concurring), the better view is that *Mullaney* error can be harmless under the right circumstances. See *Tweety* v. *Mitchell*, 682 F. 2d 461, 465 (CA4 1982); *Dorsey* v. *State*, 278 Md. 221, 224-225, 362 A. 2d 642, 645 (1976). The closely related rule of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), is also subject to harmless error analysis. See *Rose*, 478 U. S., at 579-580. Errors which "alter the terms under which the jury considered the defendant's guilt or innocence," can still be harmless. *Id.*, at 582, n. 11. What matters is whether *Blakely* error is the type of error that is simply incompatible with harmless error analysis, like *Hillery* or *McKaskle*, or is it, like *Gideon*, one of those "errors [that] deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determining guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' " *Neder* v. *United States*, 527 U. S. 1, 8-9 (1999) (quoting *Rose*, *supra*, at 577-578).

Blakely error deprives the defendant of having the jury find beyond a reasonable doubt every element of the crime. Under *Neder*, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair . . . ." 527 U. S., at 9 (emphasis in original). The *Neder* Court relied on earlier examples of missing or improper instructions on elements being held harmless. See *id.*, at 9-10. A perjury conviction was not reversed for "plain error" in a case where the judge rather than the jury found materiality when the evidence was "overwhelming" and "[m]ateriality was essentially uncontroverted . . . ." See *Johnson* v. *United States*, 520 U. S. 461, 470 (1997). In the context of such overwhelming evidence, the error did not " 'seriously affect[] the fairness,

integrity, or public reputation of judicial proceedings.' " *Id.*, at 469 (quoting *United States* v. *Olano*, 507 U. S. 725, 736 (1993)). Harmless error was also applied in several cases involving improper instruction on one element of the offense. See *Neder*, *supra*, at 9-10; *Yates* v. *Evatt*, 500 U. S. 391, 402-403 (1991); *Carella* v. *California*, 491 U. S. 263, 266-267 (1989) (*per curiam*); *Pope* v. *Illinois*, 481 U. S. 497, 501-502 (1987).

The obstacle to *Neder*'s holding was *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993), which held that a defective reasonable doubt instruction was not amenable to harmless error analysis. The *Sullivan* Court provided two rationales for its decision that the improper reasonable doubt instruction could not be harmless. One was that an improper reasonable doubt instruction cannot be harmless because it "vitiates *all* the jury's findings," *id.*, at 281 (emphasis in original), which produces "consequences that are necessarily unquantifiable and indeterminate . . . ." *Id.*, at 282. This holding was compatible with a finding that a failure to instruct on a particular element was harmless, since that error did not vitiate all of the jury's findings. See *Neder*, 527 U. S., at 11. But the *Neder* decision also had to address *Sullivan*'s other rationale, that "harmless-error analysis cannot be applied to a constitutional error that precludes the jury from rendering a verdict of guilty-beyond-a-reasonable-doubt because 'the entire premise of *Chapman* review is simply absent.' " *Ibid.* (quoting *Sullivan*, *supra*, at 280). Harmless error is improper in this circumstance, according to *Sullivan* because the error's effect cannot be measured. As the *Sullivan* Court explained, if there is no verdict of guilty-beyond-a-reasonable-doubt then "the question whether the *same* verdict of guilty beyond a reasonable doubt would have been rendered is utterly meaningless. There is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Sullivan*, *supra*, at 280 (emphasis in original). Since the failure to instruct on an element prevents the jury from considering each element of the crime, Neder argued that *Sullivan*'s second principle applied with equal force to his case, making harmless

error analysis improper. See 527 U. S., at 11. While *Neder* was consistent with *Sullivan*'s result, it was not consistent with "the entire reasoning" of *Sullivan*. *Id.*, at 10. *Sullivan*'s more restrictive view of harmless error was disapproved.

Although the *Neder* Court found some merit to this argument in the abstract, *Sullivan*'s second rationale could not apply because it was inconsistent with a substantial body of harmless error precedent. See *id.*, at 10-11. In more than one case, an improper jury instruction on an element was susceptible to harmless error analysis. See *id.*, at 11-12. Indeed, "the absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Id.*, at 12. Whether that error can be harmless was a question that was decided by following these other harmless error precedents. See *id.*, at 12-13.

Carella addressed a California statute presuming embezzlement from a failure to return a rental car within five days of the agreed date and a statute presuming an intent to commit fraud from failing to return property within 20 days of a written demand of the owner after the lease has expired. See 491 U. S., at 264. "These mandatory directions directly foreclosed independent jury consideration of whether the facts proved certain elements of the offenses with which Carella was charged. The instructions also relieved the State of its burden of . . . proving every element of Carella's crime beyond a reasonable doubt," which was subject to harmless error analysis. See *id.*, at 266. In *Pope*, an obscenity case, the jury was unconstitutionally instructed to apply community standards to the work's value. See 481 U. S., at 500. Once again, this was still subject to harmless error analysis, even though the work's value was an element of the offense. See *id.*, at 499, n. 1, 503-504. Similarly, in *Yates*, two mandatory rebuttable presumptions, which violated *Sandstrom*, *supra*, and *Francis* v. *Franklin*, 471 U. S. 307 (1985), see 500 U. S., at 401, were subject to harmless error review. See *id.*, at 402-403.

While there could be some logic to extending *Sullivan* to a failure to instruct on an element, these cases foreclosed that result. See *Neder*, 527 U. S., at 15. Given the overwhelming evidence of the missing element in Neder's case, there was no reason to depart from precedent. See *ibid.*

While *Sullivan* was a unanimous opinion, *Neder* drew a vigorous dissent from three Justices. Justice Scalia's dissent centered on the right to jury trial. By withholding an element of the crime from the jury, the trial court in *Neder* prevented the jury from ever considering that element. See 527 U. S., at 31 (Scalia, J., dissenting). According to the dissent, allowing an appellate court to find this error harmless repeats the trial court's error of allowing a judge rather than a jury to find an element of the charged crime, see *id.*, at 32, which the dissent characterizes as an appellate court directing a verdict of guilt in a criminal case. See *id.*, at 33.

The dissent addresses the authority cited by the *Neder* majority in two ways. *Johnson* is distinguished because the defendant in *Johnson* never requested a materiality instruction. See *Neder*, 527 U. S., at 34. This makes *Johnson* more a matter of waiver to the dissent where the failure to object to the deprivation of the right to jury trial "will preclude automatic reversal." *Id.*, at 35. *Carella*, and other cases, are explained by the dissent as an unusual type of harmless error analysis. The dissent recognized that the structural error doctrine did not prevent harmless error findings with respect to the jury trial right, but that it is a "peculiar sort" of harmless error analysis, "looking not to whether the jury's verdict would have been the *same* without the error, but rather to whether the error did not *prevent* the jury's verdict." *Ibid.* (emphasis in original). *Carella*, *Pope*, and *Roy* were cases where "the facts *necessarily found* by the jury (and not those merely discerned by the appellate court) support the existence of the element omitted or misdescribed in the instruction . . . ." *Id.*, at 35 (emphasis in original). The majority's disapproval of *Sullivan*, and allowing harmless error analysis whenever an element is missing, went

too far for the dissent, allowing what it saw as the appellate court usurping the jury's function.

The dissent rests on what it sees as the sanctity of the verdict. Many constitutional errors can influence the verdict. Harmless error is permissible, "only when the jury *actually renders* a verdict—that is when it has found the defendant guilty of all the elements of a crime." 527 U. S., at 38. This analysis begs the question of why should right-to-jury errors merit such extraordinary treatment. By concentrating so closely upon the jury trial guarantee, the dissent loses sight of the general context of harmless error analysis.

As noted earlier, harmless error is the rule, and structural error is the exception. See *supra*, at 5. For an error to be exempt from harmless error analysis, there must be some substantial justification that separates it from the norm. While important to a fair trial, that fact alone does not exempt the jury trial error found in *Neder* or the present case from harmless error analysis. While ranking the importance of constitutional guarantees is uncertain at best, it is difficult to see how the reasonable doubt requirement is any less important than the jury trial guarantee. *In re Winship*, 397 U. S. 358, 363 (1970) (a criminal trial without a reasonable doubt requirement lacks fundamental fairness); see also *id.*, at 362-363 (reasonable doubt recognized as constitutionally required). Yet, as *Sandstrom* demonstrates, violations of the reasonable doubt requirement can be harmless.

The *Neder* dissent's efforts to distinguish failure to instruct on an element from other errors that influence the jury's verdict do not succeed. As the majority notes, other errors, like violations of the self-incrimination privilege or the right to confront witnesses, "infringe upon the jury's factfinding role and affect the jury's deliberative process in ways that are strictly speaking not readily calculable," but are still amenable to harmless error analysis. 527 U. S., at 18. An even better example is found in the *Sandstrom* line of cases. A mandatory conclusive presumption effectively removes that issue from the

jury's consideration. "Like an omission, a conclusive presumption deters the jury from considering any evidence other than that related to the predicate facts (*e.g.*, an intentional killing), and 'directly foreclose[s] independent jury consideration of whether the facts proved established certain elements of the offens[e]' (*e.g.*, malice)." *Id.*, at 10 (quoting *Carella*, 491 U. S., at 266). The offending instruction in *Sandstrom* was no different. "But, more significantly, even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do." *Sandstrom*, 442 U. S., at 526 (emphasis in original, footnote omitted). This error can also be found harmless. See *Rose*, 478 U. S., at 579-580.

Harmless error analysis cannot remove the taint of error from a conviction. The doctrine is derived from the recognition that while error is often inevitable, it is not inevitably fatal. As in *Neder*, *Blakely* error is not one of the rare types of structural error. It neither hopelessly compromises the trial's fairness like the complete denial of counsel, nor is *Blakely* error the type of error that has no appreciable effect on the outcome of the case, like grand jury discrimination. Unlike grand jury discrimination, or denial of self-representation, harmless error analysis will not fatally compromise *Blakely*. *Blakely* error can prejudice the defendant's trial by lessening the prosecution's burden of proof. Also, as in *Neder*, it withdraws an element from the defendant's chosen factfinder, the jury. These errors can be evaluated for harmlessness.

There is no meaningful difference between *Blakely* error and *Neder*. Since the *Apprendi/Blakely* line requires the courts to treat sentence enhancements as an element of the underlying crime under certain circumstances, *Blakely* error is the same as the error in *Neder*, withdrawing an element of the crime from the jury's consideration. See 527 U. S., at 6. The only difference is that in *Neder* the omitted element could mean the difference between guilt and innocence, while under *Blakely* the error simply influences the maximum possible sentence which

may be meted out to the guilty criminal. As *Mullaney* and *Apprendi* demonstrate, that is a distinction without a difference. Since *Blakely* error does not make the trial fundamentally unfair, and *Neder* demonstrates that the effect of a missing element on the verdict can be measured, *Blakely* error can be harmless.

II. Applying harmless error to *Blakely* will mitigate the cost of the *Griffith* full retroactivity rule.

Blakely v. *Washington*, 542 U. S. 296 (2004) is one of the most important criminal justice decisions to come from this Court. At a Senate Judiciary Committee hearing on *Blakely*, when asked if any case has had as great an impact " 'on the practical working out of justice' as *Blakely*" most experts could only come up with *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See Bowman, Train Wreck? Or Can the Federal Sentencing System be Saved? A Plea for Rapid Reversal of *Blakely* v. *Washington*, 41 Am. Crim. L. Rev. 217, 251-252 (2004). The immediate aftermath to *Blakely* was as if an earthquake had hit the criminal justice system. See Berman, Punishment and Crime: Reconceptualizing Sentencing, 2005 U. Chi. Legal F. 1, 35-36 (2005). *Blakely* and *United States* v. *Booker*, 543 U. S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) may cause "many jurisdictions . . . . to significantly restructure their sentencing systems . . . ." Berman, *supra*, at 36.

Before *Blakely*, a revolution in sentencing had developed over the last 30 years. The clear trend was away from highly discretionary to much more guided sentencing, with enhancements playing a key role in adjusting the penalty to the particular circumstances of the case. See *Booker*, 125 S. Ct., at 751-752, 160 L. Ed. 2d, at 645. *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), *Blakely*, and *Booker* are this Court's responses to these charges. See *Booker*, 125 S. Ct., at 752, 160 L. Ed. 2d, at 645-646; Berman, *supra*, at 41. Since sentencing is a part of

every criminal conviction, and there had been no indication from this Court before *Apprendi* and *Blakely* that there were constitutional problems with enhancements, this counter-revolution necessarily disrupts the administration of justice. Although not sufficient to change the substance of *Apprendi*, *Booker*, and *Blakely*, the reality of the disruption these cases are causing should influence their administration.

The total retroactivity doctrine of *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987) adds to *Blakely*'s burden on the state and, through *Booker*, federal criminal justice systems. *Griffith* retroactivity leaves an extraordinary number of sentences subject to reversal on direct review. The prior rule of limited retroactivity lessened the impact of sudden departures from precedent. One criticism of *Griffith*'s predecessor, *Linkletter* v. *Walker*, 381 U. S. 618 (1965), was that its limited retroactivity rule "cut this Court loose from the force of precedent, allowing us to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis* . . . ." *Mackey* v. *United States*, 401 U. S. 667, 680 (1971) (Harlan, J., concurring and dissenting); see also *Linkletter*, *supra*, at 644 (Black, J., dissenting). This reduces the need to adhere to precedent, making change easier. While this is a reason for the *Griffith* rule, it also shows the very different context between *Blakely* and this Court's landmark decisions of the 1960's. In the absence of *Linkletter*, the landmark *Blakely* decision will have an unprecedented impact on the administration of justice.

Landmark cases like *Mapp* v. *Ohio*, 367 U. S. 643 (1961) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966) were not made retroactive on appeal, see *Linkletter*, 381 U. S., at 640 (*Mapp*); *Johnson* v. *New Jersey*, 384 U. S. 719, 732 (1966) (*Miranda*). Avoiding the disruption of the criminal justice system that would come from full retroactivity on direct review was a substantial consideration in both cases. See *Linkletter*, *supra*, at 637-638; *Johnson*, *supra*, at 731. *Blakely* is without the net of *Linkletter* to mitigate its considerable impact. Whatever

reasons exist for the *Griffith* rule, the fact remains that *Griffith* allows *Blakely* to be more disruptive to existing judgments than either *Mapp* or *Miranda* was. Harmless error can help to alleviate the pressures on the justice system coming from the interplay between *Griffith* and *Blakely*. While the harmless error question cannot be decided by a desire to avoid disruption, it should be influenced by that consideration.

Jurisprudential concerns do inform the harmless error question. The special burdens of federal habeas on finality and comity support a lower standard for harmless error on habeas than on direct review. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 637-638 (1993). *Chapman*'s standard was itself informed by a balance of interests. See *Chapman* v. *California*, 386 U. S. 18, 22-23 (1967). Applying harmless error to *Blakely* is an appropriate response to *Blakely*'s "No. 10 earthquake" on the criminal justice system. See Sandra Day O'Connor, Speech to Annual Conference of Ninth Circuit Court of Appeals (July 22, 2004), quoted in *Blakely* Roils Waters of Federal Sentencing, 36 The Third Branch, No. 8 (Aug. 2004), http://www.uscourts.gov/ttb/august04ttb/blakely/; Bowman, The Failure of the Federal Sentencing Guidelines, 105 Colum. L. Rev. 1315, 1317 (2005).

Many people involved in the administration of criminal justice are concerned about *Blakely*. "A single court decision has created a level of confusion and uncertainty that has never been experienced in the area of criminal sentencing." Minnesota Sentencing Guidelines Commission, "The Impact of *Blakely* v. *Washington* on Sentencing in Minnesota: Long Term Recommendations 19 (2004), http://www.msgc.state.mn.us/Data%20Reports/blakely_longterm.pdf. Minnesota estimates that its system generated 300 to 400 cases a year that are likely to be subject to *Blakely*. See *id.*, at 9. Although this would not create a "severe crisis" in Minnesota, see *ibid.*, it is still a large number of reversals. The impact is likely to be significantly greater in more populous jurisdictions, and those that rely more on enhancements.

Harmless error tempers *Blakely*'s impact, while preserving its integrity. The *Chapman* rule "save[s] the good in harmless-error practices while avoiding the bad, so far as possible." See 386 U. S., at 23. When a defendant's substantial rights are not harmed, the sentence should not be swept up in *Blakely*'s tidal wave. A finding of harmless error can be made by appellate courts, allowing courts to forego the useless and administratively costly ritual of resentencing when it is clear beyond a reasonable doubt that the sentence would be the same absent the *Blakely* error. *Blakely* will not be subverted by harmless error. The *Chapman* standard is designed to avoid that problem. See *id.*, at 22-23. *Blakely* error is measurable, and it does not threaten the structural integrity of the trial. See Part I, *supra*.

"Since its surprising arrival on June 24, 2004, *Blakely* has been likened to a legal earthquake, a forty-car pile up, a bombshell, and a bull in a china shop." Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082, 1086 (2005). Harmless error will make for a more just and less messy aftermath to *Blakely* while preserving the rule's basic purpose.

III. The full retroactivity rule of *Griffith* v. *Kentucky* should be limited to cases of actual prejudice.

As discussed in Part II, *supra*, harmless error is one way to mitigate the harshness of the full retroactivity rule of *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). Modifying *Griffith* itself is another.[3]

3. This Court has previously considered retroactivity issues raised only by *amici*. See, *e.g.*, *Stovall* v. *Denno*, 388 U. S. 293, 294, n. 1 (1967); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion).

A. Retroactivity.

Under the pre-1987 approach to retroactivity, this would be an easy case. Extensions of the right to jury trial were uniformly held not retroactive. See *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968) (*per curiam*); *Daniel* v. *Louisiana*, 420 U. S. 31 (1975) (*per curiam*); see also Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Schriro* v. *Summerlin*, No. 03-526, pp. 15-18. Under the current approach to retroactivity, another branch of the *Apprendi* line of cases was held not retroactive on habeas corpus in *Schriro* v. *Summerlin*, 542 U. S. 348, 358 (2004).

For cases on direct review, however, nonretroactivity was abandoned in *Griffith* v. *Kentucky*. Together, *Griffith* and *Teague* adopted an approach to retroactivity first advanced by Justice Harlan in *Desist* v. *United States*, 394 U. S. 244 (1969) (dissenting opinion). The massive social cost of reversing judgments which were entered in trials that complied with all rules in effect at the time of the trial was justified on two grounds: integrity of the judicial process and equal treatment of similarly situated litigants.

The judicial integrity rationale comes from the source and nature of the judicial authority to make rules of constitutional law. The power vested by the Constitution is simply to decide cases and controversies, and establishing rules which are binding on state courts and sometimes contrary to statutes can only be legitimately done in the course of reaching a result required by the Constitution. See *Griffith*, 479 U. S., at 322-323; *Desist*, 394 U. S., at 258-259 (Harlan, J., dissenting); *Mackey* v. *United States*, 401 U. S. 667, 678 (1971) (Harlan, J., concurring in the judgment). If the Constitution required reversal in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), then it necessarily required reversal in *Griffith*, because the cases were not distinguishable. See *Griffith*, *supra*, at 327.

A closely related reason for the *Griffith* rule was the perceived need to treat similarly situated defendants equally.

Under the prior retroactivity system, the creation of a new rule was something of a legal lottery. " '[O]ne chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.' " *Ibid.* (quoting *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (Powell, J. concurring in the judgment)).

The *Griffith* rule, however, comes with an enormous price tag. The cost of equal generosity to all appellant-defendants is equal harshness to all their victims. Under the pre-*Griffith* system, while the woman raped by Ernesto Miranda had to endure the ordeal of testifying a second time, see G. Stuart, *Miranda*: The Story of America's Right to Remain Silent 93 (2004), hundreds and possibly thousands of other women did not. See *Johnson* v. *New Jersey*, 384 U. S. 719, 732 (1966) (nonretroactive to cases tried before the *Miranda* decision).

The proper scope of retroactivity is limited by the scope of the necessity for the rule. "[W]hen another *similarly situated* defendant comes before us, we must grant the same relief or give a *principled reason* for acting differently." *Desist*, 394 U. S., at 258 (opinion of Harlan, J.) (emphasis added). When the defendant is similarly situated and there is no principled reason for a different result, then the drastic step of reversing a judgment obtained in accordance with then-prevailing constitutional norms is a necessary evil. When these criteria are not met and the defendant has been fairly convicted and sentenced, it is just plain evil.

Justice Harlan found a principled reason for different treatment in the distinction between appeals and collateral attacks on final judgments. See *Mackey*, 401 U. S., at 688-689 (opinion concurring in the judgment). In *Teague*, 489 U. S., at 310, a plurality of this Court agreed, and the rule was subsequently endorsed by a majority in *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989). The reason for this distinction goes primarily to the judicial integrity rationale of *Griffith*. Appeals

and collateral attacks are different proceedings with different purposes. See *Mackey*, *supra*, at 682-683. From the standpoint of the defendant, the date of finality is somewhat fortuitous. See *Shea* v. *Louisiana*, 470 U. S. 51, 63-64 (1985) (White, J., dissenting).

The present case raises a different ground for distinguishing among the various defendants whose cases are tried before the announcement of a new rule but appealed afterward. Some defendants have at least a plausible claim to have been actually injured by the previously allowed but now forbidden practice, and some do not.

Apprendi v. *New Jersey*, 530 U. S. 466 (2000) itself provides the clearest example in the line of a case with a plausible allegation of actual harm. The allegation of racial bias for the hate crime enhancement was specifically contested. *Id.*, at 470-471. Indeed, it was the only major dispute in the case, because Apprendi had pleaded guilty to the underlying offenses as part of a plea bargain. See *id.*, at 469-470. The principal evidence against him was his statement, made after three hours of interrogation and later retracted. See *id.*, at 469. The finding was made by the trial judge under a preponderance standard, based on his assessment of the credibility of the witnesses. See *id.*, at 471. On these facts, one cannot say with any degree of certainty that a jury applying the reasonable doubt standard would necessarily have come to the same result. A jury trial might or might not have been more accurate. See *Ring* v. *Arizona*, 536 U. S. 584, 607 (2002); *Summerlin*, 542 U. S., at 357-358. It is sufficient for this purpose that there is a reasonable probability that the result might have been different.

The present case, in contrast, provides the clearest example in the *Apprendi* line of a pure, undeserved windfall for a guilty criminal if the judgment is reversed. The trial judge proceeded in a manner considered perfectly legal under the case law in effect at the time of the trial. If the case were retried and the question of what kind of weapon was used submitted to a jury,

nothing but patent jury nullification could prevent an affirmative finding that it was a gun.

Recuenco is not similarly situated with Apprendi. There is a principled reason for treating the cases differently. Apprendi was denied a jury trial and the reasonable doubt standard on the principal contested issue of his case. Recuenco seeks the benefit of a windfall due to fortuitous timing of his trial and appeal, on an issue that was completely uncontested and would almost certainly have been decided against him by the jury in a post-*Blakely* trial. See App. to Pet. for Cert. 18a.

B. Prejudice.

Violation of a constitutional norm does not invariably require reversal of a criminal conviction. As discussed in parts I and II, *supra*, most constitutional rules are subject to harmless error analysis. On direct appeal, harmlessness is judged by the standard of *Chapman* v. *California*, 386 U. S. 18, 24 (1967), while the more drastic remedy of collateral attack on habeas corpus is subject to the higher hurdle of *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993).

For one type of claim, though, this Court has gone beyond harmless error analysis and required an affirmative showing of prejudice as an element of the defendant's case for reversal. For ineffective assistance of counsel claims, it is not sufficient to show a violation of the Sixth Amendment guarantee. In addition, "the defendant must show that the deficient performance prejudiced the defense." *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984).

One of the reasons for this unusual requirement is the inability of the prosecution and the trial court to protect the judgment from ineffective assistance claims. "The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Id.*, at 693. Most claims on appeal and habeas corpus are claims that the prosecution, the trial judge, or occasionally a

juror or court employee took some action that violated existing rules of law. Ineffective assistance is an exception, and the helplessness of the state to prevent it justifies the requirement that the defendant affirmatively show prejudice.

So it is with new rules created after the trial. A trial judge cannot possibly anticipate every change in legal doctrine that might come between the trial and the date of finality. A judge who rules in accordance with current law has done his or her job correctly, even if this ruling is later found to be "error" in the technical sense. See *Johnson* v. *United States*, 520 U. S. 461, 467 (1997). Lack of prescience is not, however, "error" in the ordinary sense, and violation of an existing rule is fundamentally different from violation of a rule created *ex post facto*. Cf. U. S. Const., Art. I, §§ 9, cl. 3, 10, cl. 1.

Requiring appellants who seek the benefit of new rules to make a *Strickland*-like showing of prejudice would further ameliorate the different treatment of similarly situated defendants that *Griffith* sought to reduce. At present, those defendants whose attorneys anticipated the change receive the same review as in cases tried after creation of the rule. Those defendants whose attorneys simply concentrated on making the best defense available under current law typically receive only a "plain error" review. See, *e.g.*, *Johnson*, 520 U. S., at 465-466.[4]

Under the federal "plain error" standard, "overwhelming" evidence of the omitted element and its "essentially uncontroverted" status means that failure to submit the element to the jury is not "plain error." *Johnson*, *supra*, at 470. Under *Griffith* and *Johnson* as they presently stand, some clearly guilty defendants would get the windfall of a reversal while some would not, based on whether their lawyers made objec-

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4. This varies by jurisdiction. The intermediate appellate court in the present case stated that in Washington, "a 'manifest' constitutional error . . . may be reviewed for the first time on appeal." App. to Pet. for Cert. 18a.

tions at trial which the trial judge could not have legally sustained. A prejudice requirement for all appellants seeking retroactive application of new rules would make the availability of reversal depend more on the merits of the case and less on the prescience of the lawyer.

The addition of a prejudice requirement would have no significant impact on the ability of this Court to make new rules. Prejudice, unlike retroactivity, need not be decided before the underlying question. Compare *Strickland*, 466 U. S., at 697, with *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994). Like harmless error, prejudice can be left for decision on remand. Cf. *Ring*, 536 U. S., at 609, n. 7.

In summary, the ill effects of the *Griffith* rule can be mitigated, without impairing its purposes, by requiring an affirmative showing of prejudice from any appellant seeking the benefit of a new rule created after the trial. *Amicus* respectfully submits that the Court should adopt such a requirement.

CONCLUSION

The decision of the Supreme Court of Washington should be reversed.

December, 2005

Respectfully submitted,

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FILED
JAN 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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January 18, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

The question presented in the State of Washington's petition for certiorari was as follows:

> Whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, including the right to a trial by jury at issue in this case, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in all manner of cases concerning substantive criminal law and criminal procedure, including *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Neder v. United States*, 527 U.S. 1 (1999).

The Washington Association of Criminal Defense Lawyers ("WACDL") is an organization of more than 700 lawyers formed to improve the quality and administration of the criminal justice system. The organization works to protect and ensure the individual rights guaranteed by the Washington and Federal Constitutions, and to improve the professionalism of all lawyers practicing in the criminal

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[1] The parties have consented to the filing of this brief, and written letters of consent are on file with this Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation of this brief.

courts. WACDL has been granted leave to file *amicus* briefs on numerous occasions in the Washington courts.

SUMMARY OF ARGUMENT

In criminal trials, this Court has distinguished between "structural" error, for which reversal of a conviction is automatic, and ordinary "trial" errors, which are subject to review for harmlessness. Certain errors are structural because of the way they impact the development of the record that an appellate court would review were it to conduct harmless-error analysis. Specifically, if a defendant's constitutional right is violated in a way that discourages the defendant from bringing to bear all the evidence and legal arguments at his or her disposal, then harmless-error analysis is impossible. Under such circumstances, it would be misleading to review the record as a whole to determine whether the jury would have found the defendant guilty beyond a reasonable doubt, as required by *Chapman v. California*, 386 U.S. 18, 23-24 (1967): the evidence of guilt will be undisputed only because the constitutional error led the defendant to refrain from disputing the government's evidence.

The violation of the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), is such a structural error. *Apprendi* and *Blakely* require that allegations that increase the potential punishment to which the defendant is exposed must be pled in the charging instrument and proved to the jury beyond a reasonable doubt. An *Apprendi/Blakely* violation distorts the entire factfinding process of the trial because the effects of such an error stretch from the outset of the criminal process through the jury instruction. The factual allegations of the charging instrument provide the elements of the offense at issue. The trial takes shape around the factual disputes with respect to those elements. If evidence of an aggravating fact that was not charged and will not be the subject of the jury's consideration is nonetheless introduced at trial, the defendant

has no incentive to dispute it. Indeed, in many circumstances the strategic best course is *not* to dispute such legally irrelevant facts. An appellate court reviewing such an "undisputed" record cannot judge the impact of the error on the trial because it cannot know what was left out of the record it is reviewing.

The error in *Neder v. United States*, 527 U.S. 1 (1999), — the submission of the question of materiality to the judge and not the jury — was a pure instructional error that did nothing to distort the trial record. Petitioner's and the United States' reliance on *Neder* is, therefore, misplaced. Both the defendant and the prosecution fully understood that materiality was an "element" of the offense, and the defendant thus had every incentive to bring to bear all of his evidence on the question. Because the trial record was unaffected by the subsequent instructional error, harmless-error review was possible. The same was also true in all of the cases on which *Neder* relied, in which this Court applied harmless-error review to purely instructional errors.

The *Apprendi/Blakely* error at issue here involves a far more fundamental breakdown of the criminal process. Applying harmless-error review would be indistinguishable from permitting a court to direct a verdict against a defendant with respect to an aggravated version of an offense proved to a jury beyond a reasonable doubt. But this Court has made clear that directed verdicts of guilt are never permitted and never subject to harmless-error review. To allow harmless-error review here would be inconsistent with that sound rule of law.

Further, in developing the rule of *Apprendi* and *Blakely*, this Court recognized the unique power of the jury to provide leniency and check the authority of judges to punish. Applying harmless-error analysis to *Apprendi/Blakely* errors would give judges a risk-free opportunity for an end-run around the jury's protective function. A judge who believed a defendant was undercharged could impose a harsher sentence

based on his or her view that an aggravating fact had been proved beyond a reasonable doubt. If the reviewing court were to agree, then the defendant would be convicted of an aggravated version of the crime charged without ever having had the opportunity for the jury to exercise its unreviewable power to choose a lesser-included offense.

Finally, there is no reason to undermine the values of the Sixth Amendment jury right by reviewing *Apprendi/Blakely* errors for harmlessness. Harmless-error analysis was developed in response to the perception that the criminal process was becoming bogged down with endless retrials as a result of seemingly insignificant and often technical errors. But recognizing that *Apprendi/Blakely* errors are "structural" will not result in any retrial. Whenever such an error occurs, the defendant will have necessarily been found guilty of a lesser offense and will be subject to the punishment authorized by that offense. No conviction based on a jury's findings will be undone as a result of vigorously protecting the rule of *Apprendi/Blakely* from erosion through harmless-error review.

ARGUMENT

I. *APPRENDI/BLAKELY* ERRORS ARE STRUCTURAL BECAUSE THEY AFFECT THE ENTIRE CONDUCT OF THE TRIAL AND THE FRAMEWORK WITHIN WHICH THE TRIAL PROCEEDS.

This Court has recognized that there exists a certain category of errors which are "structural" and hence "defy analysis by 'harmless-error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Such errors affect "the entire conduct of the trial from beginning to end" or alter the "framework within which the trial proceeds." *Id.* at 309-10.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence ...." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Certain errors have been deemed "structural" because they pervade the entire trial process by altering the very manner in which the central factual issues are developed. *Gideon v. Wainright*, 372 U.S. 335 (1963) (denial of right to counsel, recognized as not subject to harmless error analysis in *Chapman*, 386 U.S. at 23 n.8; *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of right of self-representation at trial); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (denial of effective assistance of counsel due to conflict of interest).[2] When such errors occur, harmless error analysis is not possible because the very record which an appellate court would review is an unreliable guide for determining whether the defendant is guilty beyond a reasonable doubt. *See Yates v. Evatt*, 500 U.S. 391, 404 (1991) (instructing that the first step in conducting harmless error review is to determine "what evidence the jury actually considered"), *disapproved on other grounds, Estelle v. McGuire*, 502 U.S. 62 (1991). When, for example, defense counsel is tainted by a conflict of interest because he also represents a co-defendant, the problem is that there are a variety of decisions that may *not* have been made, and hence did not make their way into the record. "[T]he evil — it bears

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[2] Certain of the errors this Court has deemed "structural" go to how the facts developed at trial have been evaluated. *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction); *Tumey v. Ohio*, 273 U.S. 510 (1927) (denial of right to impartial judge, recognized in *Chapman*, 386 U.S. at 23 n.8). Still others do not impact the manner in which the record is developed or evaluated at trial. They nonetheless are not subject to harmless error analysis for the distinct, but equally important, reason that they so distort the framework of the criminal process that affirmance of a conviction obtained through such a process is intolerable. *Gray v. Mississippi*, 481 U.S. 648 (1987) (improper exclusion of juror from death penalty case); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of individuals from grand jury on basis of race); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (right to a public trial).

repeating — is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Holloway*, 435 U.S. at 490 (emphasis omitted). Certain errors distorting the creation of the record itself make it too "difficult to judge intelligently the impact" on the trial. *Id.* at 491.

Ordinary "trial errors" are different. They are subject to harmless error analysis because the record that was developed is a sufficiently reliable context against which an appellate court can evaluate the impact, if any, of the error. *Fulminante*, 499 U.S. at 307-08.

Apprendi/Blakely errors fundamentally alter the manner in which the factual issues are developed throughout a trial. When an *Apprendi/Blakely* error occurs, the trial record that has been developed is itself an unreliable guide to determine whether the jury would have found an aggravating fact to have been proved beyond a reasonable doubt because there is no reason to believe that an appellate court would be reviewing a record that includes all the evidence that the defendant could bring to bear in his defense. Such errors too, then, should be deemed "structural" and not amenable to harmless error analysis.

The impact of *Apprendi/Blakely* errors stretches from the outset of the criminal process through the verdict. As the State concedes, *Apprendi* and *Blakely* require the prosecution and the court to treat any fact that exposes the defendant to an increased maximum penalty as functionally equivalent to an element of the crime charged. Pet. Br. 10. The elements of the crime charged are the central points of contention in a criminal trial. They provide notice of precisely what facts the defendant must dispute if he is to escape conviction and precisely what is at stake in terms of the maximum punishment to which he is exposed. As this Court observed in *Apprendi*:

> As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, ... stated with such certainty and precision, that the defendant ... may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly ... and that there may be no doubt as to the judgment which should be given, if the defendant be convicted."

530 U.S. at 478 (omissions in original) (emphasis omitted) (quoting J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862)); *United States v. Reese*, 92 U.S. 214, 232-33 (1875) (Clifford, J., dissenting) (stating that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted"). Ultimately, to obtain a verdict of guilt, the prosecution bears the burden of proving to a jury each element of the crime charged beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 232 (1999); *United States v. Gaudin*, 515 U.S. 506, 511 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Patterson v. New York*, 432 U.S. 197, 210 (1977); *In re Winship*, 397 U.S. 358, 364 (1970). When this Court stated that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt," *Jones*, 526 U.S. at 243 n.6, it was recognizing the overarching importance that the elements of the offense play in the criminal process.

An *Apprendi/Blakely* error thus casts a dark shadow over the entire trial. If the prosecutor or judge fails to articulate an element of the offense, then the defendant will not know that he must dispute that fact. Neither will the defendant know what precise degree of punishment he faces (which will substantially impact his decision whether to accept a plea bargain). Such an error truncates the presentation of evidence by the defendant in ways that render harmless error analysis

impossible. The record that an appellate court will review following a trial infected by *Apprendi/Blakely* error will look different than what it would have looked like had there been no such error.

A review of how the facts were developed in *Jones* reveals why harmless error cannot be applied to the *Apprendi/Blakely* error. In *Jones*, the defendant was charged with carjacking under the then-prevailing version of 18 U.S.C. § 2119. The statute set forth the offense of carjacking, which included a potential punishment of up to 15 years in prison. But two subsections increased the potential punishment, the first to 25 years if serious bodily injured resulted, and the second to life in prison if death resulted. *Jones*, 526 U.S. at 230 (reproducing text of statute). The indictment did not state that the government would be seeking the increased penalty for serious bodily injury, nor did the facts alleged in the indictment indicate that the government would present evidence that serious bodily injury occurred. *Id.* at 230-31. The jury was not asked to find that serious bodily injury occurred. *Id.* at 231.

Nonetheless, during the trial, the victim testified that his ear bled profusely as a result of the attack, and that "a physician had concluded that [the victim] had suffered a perforated eardrum, with some numbness and permanent hearing loss." *Id.* On the basis of this testimony, the judge found that serious bodily injury had occurred and sentenced Jones above the 15 year limit that would have applied had there been no finding of serious bodily injury. *Id.*

There is no question that the extension of Jones's sentence beyond 15 years, if it happened today, would violate the rule of *Apprendi*. And because of the error, an appellate court could not scour the record in an effort to determine, as the State and the United States suggest, whether the record indicates that the jury would have found serious bodily injury had it been asked. The record under review may well contain uncontroverted evidence that serious bodily injury occurred

(for example, permanent hearing loss), and hence support an appellate court's conclusion that the jury would have found serious bodily injury beyond a reasonable doubt. But there is no reason to believe that the record that the appellate court would be reviewing is the record that would have been developed in the absence of the error. Under the rule of *Apprendi*, defense counsel would have had no reason to cross-examine the victim concerning the extent of his injuries. There would have been no reason to explore, for instance, the medical basis of the physician's conclusion that he suffered "permanent" hearing loss. Defense counsel would have had no reason to believe that the evidence admitted (presumably) as part of the *res gestae* of the offense would later be seized upon for the entirely different, and in fact unlawful, purpose of enhancing his sentence beyond the 15 year limit. The question of serious bodily injury was not going to be the subject of jury deliberations. And defense counsel reasonably could conclude that it would be poor strategy, in light of the fact that those assertions are legally irrelevant, to attack the extent of the victim's injuries because of the risk of offending the jury. *Cf. Shepard v. United States*, 290 U.S. 96, 103 (1933) ("A trial becomes unfair if testimony ... may be used in an appellate court as though admitted for a different purpose, unavowed and as unsuspected."). Because the error itself contributed to the production of a less-than-complete record that supports the conclusion that the error was harmless beyond a reasonable doubt, harmless error analysis is inappropriate.

A similar distortion of the record on the aggravating fact occurred in this case. It is true that the information sheet alleged that the "deadly weapon" at issue in the case was a "handgun." J.A. 3, 5. But, as respondent points out, a "handgun" is always a deadly weapon, but a "handgun" is not always a "firearm." Resp. Br. 19. Washington law states that a "firearm" is an operable gun. Wash. Rev. Code § 9.41.010; *State v. Padilla*, 978 P.2d 1113 (Wash. Ct. App. 1999); *State*

v. Franklin, 704 P.2d 666, 671 n.3 (Wash. Ct. App. 1985). The prosecuting attorney insisted that the question of whether a firearm was used was not an "element" of the offense charged. J.A. 35 ("[T]here is no element[] of a firearm. The element is assault with a deadly weapon."). And trial counsel did not "develop[] evidence on [the firearm issue] because it wasn't in our interest to do so." J.A. 38. Indeed, it would have been strategically unwise for defense counsel to place in the record evidence challenging the operability of the firearm. Defense counsel was trying to win an acquittal. In light of the *Blakely* error, the jury was not going to be asked to determine whether the "handgun" under dispute was, in fact, a "firearm" under Washington law. So had defense counsel put in evidence that the "handgun" was not a "firearm" the jury would have (1) been puzzled as to why the defendant was trying to draw such a distinction, and (2) might have concluded that the defendant was conceding that a "handgun" was used. *See Monge v. California*, 524 U.S. 721, 729 (1998) ("A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved."). It is sometimes a hard strategic question for defense counsel whether to dispute an aggravating element (like the "firearm" at issue here) at the risk of undermining a client's claim of innocence. But there is no question at all that counsel should not undermine his client's claim of innocence by disputing facts at trial that the jury is not being asked to consider.

In sum, *Apprendi/Blakely* errors contribute to the production of a limited trial record on the very factual allegation that an appellate court would be asked to review, if the errors were deemed potentially harmless. As a result, such errors leave an appellate court without a reliable and complete record to examine under the *Chapman* standard of harmless beyond a reasonable doubt. *Holloway*, 435 U.S. at 490-91. The consequences of the error are thus "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 281-

82. Because no reviewing court, in light of the distorted record, can determine whether an *Apprendi/Blakely* error is harmless beyond a reasonable doubt, the error should be deemed "structural."

II. REVIEWING *APPRENDI/BLAKELY* ERRORS FOR HARMLESSNESS WOULD EXTEND *NEDER v. UNITED STATES* AND OTHER INSTRUCTIONAL ERROR DECISIONS, AND WOULD EFFECTIVELY EVISCERATE THE PROTECTIONS OF *APPRENDI* AND *BLAKELY*.

Petitioner contends that *Apprendi/Blakely* error is, contrary to the argument detailed above, quite narrow. Petitioner repeatedly characterizes *Apprendi/Blakely* error as nothing more than imprecision in a jury instruction or the outright failure to instruct the jury on an element — specifically, the aggravating element that increases the potential punishment — of the offense. Pet. Br. 8, 10, 11, 18. Based on that characterization of the error, petitioner claims that this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), controls here because the error in *Neder* — the failure to instruct the jury on a single element of the offense — was deemed subject to harmless-error review.

Because petitioner has mischaracterized the nature of the error, and ignored its full scope, its reliance on *Neder* is misplaced. Applying *Neder* here is, in fact, a dramatic extension of the case, one which would have the effect of undoing the protections that *Apprendi* and *Blakely* were designed to ensure.

A. Nothing In *Neder* Or Any Other Instructional Error Decision Requires That *Apprendi/Blakely* Errors Be Reviewed For Harmlessness.

Neder was a "narrow" decision that arose out of unusual circumstances. *Neder*, 527 U.S. at 17 n.2. Ellis Neder was charged with, *inter alia*, bank fraud and two counts of filing false income tax returns arising out of certain fraudulent real

estate transactions. *Id.* at 4-6. The parties understood that materiality was an element of these offenses.[3] *Id.* at 6. Nonetheless, the district court concluded that the question of materiality was one for the court, not the jury, and thus specifically instructed the jury *not* to consider whether the allegedly false statements were material. *Id.* This Court subsequently concluded in *Gaudin* that when materiality is an element of an offense, the defendant has the right to insist upon a jury finding that the prosecution established materiality beyond a reasonable doubt. *Neder*, 527 U.S. at 4 (specifically discussing tax charges) (citing *United States v. Gaudin*, 515 U.S. 506 (1995)).

It is clear, then, that the error in *Neder* simply concerned whether the instruction given to the jury was proper. This Court explicitly defined the error in *Neder* narrowly as "a jury instruction that omits an element of the offense." 527 U.S. at 8. This Court further emphasized the narrow nature of the ruling when it relied upon its prior application of harmless-error analysis "to cases involving improper instructions on a single element of the offense." *Id.* at 9-10 (citing cases).

Petitioner believes that *Neder* controls here only because Petitioner believes that this case involves a mere error in the jury instruction. Pet. Br. 18. That is wrong as a matter of both federal and state law.

First, as a matter of federal law, and as discussed above, an *Apprendi/Blakely* error infects the trial from start to finish, while the error in *Neder* did not come into play until the jury was instructed. Unlike an *Apprendi/Blakely* error, nothing about the error in *Neder* distorted the defendant's ability or incentive to present at trial his best evidence concerning materiality. Unlike an *Apprendi/Blakely* error, nothing about

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[3] The district court concluded that materiality was not an element of either the mail fraud or wire fraud statutes. This Court reversed that aspect of the decision, but did not itself review whether that error was harmless. *Neder*, 527 U.S. at 25.

the error in *Neder* would have left the defendant uncertain about precisely what punishment he was facing based on which facts the prosecution was submitting. Unlike an *Apprendi/Blakely* error, nothing about the error in *Neder* would have forced defense counsel to undermine his claim of innocence by challenging the government's evidence on a legally irrelevant factual assertion.

Second, as a matter of state law, the Washington Supreme Court specifically accepted that the instruction given to the jury in this case was "correct;" the problem was the improper imposition of an enhancement to Recuenco's sentence for use of a firearm in violation of "his due process and jury trial rights."[4] Pet. App. 7a-8a. Recuenco was charged with second degree assault with a "deadly weapon." His trial proceeded on the prosecution's view that the use of a "firearm" was not an element of the offense charged. His counsel recognized that it was not in his interest to dispute at trial whether the handgun at issue was, in fact, a "firearm" under state law. The jury was instructed to find only that Recuenco used a "deadly weapon" in connection with the assault. Yet in the end the judge convicted and sentenced Recuenco for an aggravated version of the offense — assault with a firearm. This is no mere "instructional" error.

Because this case involved far more than mere "instructional error," all of the other instructional error cases relied upon by petitioner are as inapposite as *Neder*. For example, in *Pope v. Illinois*, 481 U.S. 497, 499 (1987), the trial court in an obscenity prosecution erroneously instructed the jury that it should evaluate the accused material based on "how it would be viewed by ordinary adults in the whole

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[4] *Amici* agree with respondent's view that state law actually prohibits the State from imposing the firearm enhancement they are trying to obtain through harmless-error review. Resp. Br. 8-13. For that reason, *amici* also agree that state law prohibits this Court from ordering that harmless-error review be conducted in this case, and that it may be appropriate to dismiss the writ as improvidently granted on that ground. *Id.* at 40.

State of Illinois." This Court found that instruction erroneous because the jury should have been asked to evaluate the material based on an objective "reasonable person" standard rather than one linked to any community standards peculiar to Illinois. *Id.* at 500-01. As in *Neder*, the error in *Pope* was purely instructional and there is no reason to believe it had any effect on the development of the record that an appellate court would review to determine harmlessness. Whether the jury would apply an Illinois-adult standard or an objective reasonable-person standard, the defendant had every incentive to present evidence of the required "[l]iterary, artistic, political or scientific value" required by *Miller v. California*, 413 U.S. 15, 24 (1973).

The other instructional errors that this Court has held are subject to harmless error review all, likewise, did not infect the development of the record that the appellate court reviews. This Court flatly said as much in *Rose v. Clark*, 478 U.S. 570 (1986), where a jury was erroneously instructed that it should presume malice in a homicide. *Id.* at 579 n.7 (stating "the error in this case did not effect the composition of the record"). To the contrary, because the improper presumption placed the burden of producing evidence negating a finding of malice on the defendant, the record most surely included all the defendant had to offer on the issue. *See also Yates*, 500 U.S. at 404-05 (applying harmless-error analysis to erroneous jury instruction regarding presumption of malice). Similarly, the application of harmless error to erroneous instructions, including a conclusive presumption, *Carella v. California*, 491 U.S. 263 (1989) (per curiam), does no violence to the criminal process because the reviewing court examines the predicate facts relied upon in the instruction to determine whether they "'are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact.'" *Yates*, 500 U.S. at 406 n.10 (quoting *Carella*, 491 U.S. at 271

(Scalia, J., concurring)); *see also California v. Roy*, 519 U.S. 2, 7 (1996) (per curiam) (Scalia, J., concurring).

In each case of true "instructional" error, harmless error can be applied because the trial took place under circumstances in which the defendant had the incentive and the opportunity to develop fully the facts that were the subject of the appellate court's review. That is not the case when a trial is infected by *Apprendi/Blakely* error. Therefore, harmless error review is not "susceptible of intelligent, evenhanded application." *Holloway*, 435 U.S. at 490.[5]

B. To Hold That *Apprendi/Blakely* Errors Can Be Harmless Would Fundamentally Alter The Framework Of The Criminal Process.

Once one lifts the fog of the petitioner's claim that *Apprendi/Blakely* error is mere "instructional" error, it becomes clear just how radical a change in the criminal process applying harmless error analysis to *Apprendi/Blakely* errors would produce. There was nothing wrong with how the trial court instructed the jury. There was nothing wrong with the verdict returned by the jury. The process employed produced a complete verdict on the crime charged: second degree assault with a deadly weapon. But *after* that process ran its course, the judge entered a judgment of conviction and

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[5] Petitioner, but notably *not* the United States, also claims that this Court's *per curiam* decision in *Mitchell v. Esparza*, 540 U.S. 12 (2003), also requires that *Apprendi/Blakely* errors be reviewed for harmlessness. Pet. Br. 17-18. *Mitchell* involved the failure of the prosecution to allege that the defendant was the "principal offender" in an aggravated murder case, which would make him eligible for the death penalty. 540 U.S. at 14. Because the issue came to this Court on *habeas corpus* review, all this Court was considering was whether the state courts had unreasonably applied this Court's prior decisions. *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (O'Connor, J.) (stating that an "unreasonable application of federal law is different from an incorrect application of federal law") (emphasis omitted). Therefore, it might have been wrong to have applied *Neder* in *Mitchell*, but not unreasonably so.

imposed punishment on a different and more severe offense: second degree assault with a firearm. To allow this error to be subject to review for harmlessness would alter the "framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-10.

1. Allowing Apprendi/Blakely *errors to be reviewed for harmlessness transforms the protections of those cases into a license for judges to direct a verdict on aggravated offenses.* To accept petitioner's position would be to allow a directed verdict of guilt, which this Court has squarely foreclosed. Consider the following alternative mechanism for arriving at the same result the State seeks here. Imagine the state actually charged both crimes — second degree assault with a deadly weapon and second degree assault with a firearm.[6] Imagine further that the judge submitted only the deadly weapon charge to the jury, stating that he had concluded that the firearm allegation had been proved beyond a reasonable doubt, and that he would order a directed verdict on the aggravated (firearm) charge if the jury returned a guilty verdict on the lesser deadly-weapon charge. After the jury returned its guilty verdict on the deadly-weapon charge, the judge entered a judgment of guilt on the firearm charge and sentenced him accordingly.

On appeal, respondent would have claimed that the directed verdict of guilt on the firearm charge was unlawful. There is no doubt that it would have been. "[R]egardless of how overwhelmingly the evidence may point" toward the defendant's guilt, a trial judge may not direct a verdict of guilt. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Bhd. of Carpenters v. United*

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[6] *Amici* acknowledge, along with respondent, that under state law, Recuenco could not have been charged with second degree assault with a firearm. Resp. Br. 11-13. But for purposes of exploring the consequences of permitting *Apprendi/Blakely* errors to be reviewed for harmlessness, one can hypothesize a statute that in fact permits both aggravating facts — deadly weapon and firearm — to be charged and proved to a jury.

States, 330 U.S. 395, 408 (1947) (stating "a judge may not direct a verdict of guilty no matter how conclusive the evidence"). Imagine the State acknowledged the error, but asked the appellate court to determine that it was harmless.

There is no doubt that the conviction on the aggravated firearm charge would have to be reversed. In *Carpenters* this Court refused to "enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy.... No matter how strong the evidence may be ... there must be a charge to the jury ...." 330 U.S. at 408. That is, in *Carpenters* this Court held that harmless error review should not be undertaken on appeal following a directed verdict. Even as this Court allowed harmless error review of the instructional error in *Rose*, it acknowledged that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury." 478 U.S. at 578.

The *Blakely* error that occurred during Recuenco's trial is indistinguishable from the directed verdict in the alternative discussed above. In both situations the defendant was found guilty by the jury of one offense, but was convicted and sentenced for an aggravated offense based solely on the judge's evaluation of the record. In both situations there is no dispute that the conviction for the aggravated offense was unlawful. The only difference is that the *Blakely* error is actually worse. In the directed verdict hypothetical, the defendant was at least placed on notice that he was subject to punishment for the firearm offense, and therefore had every incentive to create as strong a record as he could regarding the firearm allegation. As discussed above, *supra* at 4-11, *Blakely* error infects the entire trial and actually distorts the record that an appellate court would be reviewing. If anything, the case for applying harmless-error analysis to a directed verdict is *stronger* than the case for applying harmless-error analysis to *Apprendi/Blakely* error.

2. Allowing Apprendi/Blakely *errors to be reviewed for harmlessness would undo the protections those cases were designed to preserve.* This Court's decision in *Blakely* was an explicit acknowledgment that the jury right is a vital mechanism for restraining the power of judges. *Blakely*, 542 U.S. at 305-06 (stating that the jury right is "a fundamental reservation of power in our constitutional structure.... [so as to] ensure[] the people's ultimate control ... in the judiciary"). As this Court first began developing the robust view of the Sixth Amendment jury right that has prevailed in *Apprendi*, *Blakely* and *United States v. Booker*, 543 U.S. 220 (2005), it noted that by requiring a jury to find all facts essential to authorize punishment of a certain severity, juries "check[]" the power of judges to impose severe sentences by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones*, 526 U.S. at 245 (citing 4 Blackstone, *Commentaries* 238-39 (1769)). The jury is a reservation of the authority to be lenient in the people, and it operates without the need "to give any reason for an acquittal, and it faces no review by a court or a legislature." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 61 (2003).

To allow *Apprendi/Blakely* errors to be subject to review for harmlessness would provide an end-run around the essential protection of the jury right. A prosecutor might refrain from charging and submitting to the jury any aggravating factors that could potentially increase a defendant's punishment. After the jury returns a verdict on the lesser offense that was charged, the prosecutor could ask the judge to find that the state submitted uncontroverted evidence of the aggravator, and so proved the existence of the aggravator beyond a reasonable doubt. If the trial judge concludes that the aggravating fact was proved beyond a reasonable doubt, and imposes the more severe sentence, under the harmless-error test that petitioner proposes, the

sentence would have to be affirmed if the reviewing court agreed that the aggravator was proved beyond a reasonable doubt. The more severe sentence would be imposed without the jury ever having had the opportunity to consider both the aggravated and lesser offense, and determine whether to exercise leniency toward the defendant.

Indeed, the judiciary's overtaking of the prerogatives of the jury are not even dependent on prosecutorial encouragement. Many state judges are elected, and it is no secret that some feel political pressure to demonstrate their toughness on crime. If such a judge thought a defendant had been undercharged, he might impose an enhancement based on a fact never submitted to the jury. Others might feel the need to go beyond the sentence authorized by the crime charged and proved to the jury in response to the families of victims and victims themselves who come forward seeking a tough penalty. These are not merely theoretical possibilities. In Washington, some judges are looking for authority to exercise greater control over sentencing than current law provides. *See Judges Eye More Say Over Penalties*, The Columbian News, Dec. 19, 2005, at C1, *available at* http://www.columbian.com. Indeed, the trial judge in *Blakely* reached out and determined that in his view the defendant had been undercharged and that he would impose, based on his own findings, an additional sentence above the range permitted. Br. for Pet'r at 6-7, *Blakely v. Washington*, No. 02-1632 (U.S. filed Dec. 4, 2003). Allowing *Apprendi/Blakely* errors to be reviewed for harmlessness will permit a judge to exercise greater sentencing control, whether in response to his or her own sense of justice or to an appeal from a victim, in the hopes that an appellate court will agree with his or her own evaluation of the record and affirm the sentence despite the unlawful manner in which it was attained.

A judge who enhances a sentence based on an uncharged aggravator with respect to which the jury was not instructed can rest assured that his legal error is risk-free. The worst

that happens is that the defendant will receive the maximum sentence that he could have received under the jury's findings. Put simply, the cost to the trial judge of meting out punishment based on his or her own sensibilities, without regard to the limitations imposed by the jury's findings, is low.[7] The adoption of rules of review of trial errors that make such errors "virtually risk free" is undesirable. *Fulminante*, 499 U.S. at 309.

In the end, permitting review of *Apprendi/Blakely* errors for harmlessness could effectively wind the clock back to what looks strikingly similar to the pre-*Apprendi* sentencing regime. Before *Apprendi*, *Blakely* and *Booker*, courts had to determine whether particular facts that could impact the legally permissible sentence were "elements" or "sentencing factors." If they were elements, as noted above they had to be charged, and proved to a jury beyond a reasonable doubt. But if they were sentencing factors, then there was no right to a jury and the facts could be proved to a judge by a mere preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam); *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986). *Apprendi* and the cases that followed it eliminated the distinction between sentencing factors and elements. The jury became the focal point and the necessary factfinder (under the beyond a reasonable doubt standard) for *any* fact that increased the potential punishment to which the defendant was exposed. *Apprendi*, 530 U.S. at 490. To allow harmless-error analysis to apply when *Apprendi* is violated is to allow judges to regain their position as finders of what are essentially sentencing factors. The only difference is that under *Chapman*'s standard, judges must find that the sentencing factors were proved beyond a reasonable

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[7] By contrast, the cost to the appellate courts will be high. They will carry the burden of reviewing such enhancements in light of the entire trial record to determine whether the jury, had it been asked to consider the fact, would have concluded that it had been established beyond a reasonable doubt.

doubt. Harmless-error analysis here thus does more than just determine whether there is any reasonable chance that the error changed the outcome. It rearranges power between the judiciary and jury right back to where matters stood before *Apprendi* and *Blakely*.

III. REVIEWING *APPRENDI/BLAKELY* ERROR FOR HARMLESSNESS DOES NOT SERVE THE VALUES OF APPLYING HARMLESS-ERROR ANALYSIS IN OTHER CONTEXTS.

There is no reason to do violence to the Sixth Amendment by permitting *Apprendi/Blakely* errors to be reviewed for harmlessness. Review of such errors for harmlessness would fail to advance the values of including a harmless-error safety valve in the criminal process.

The doctrine of harmless error grew out of the widespread sentiment that defendants were able to win reversal of otherwise valid convictions on the basis of mere technicalities. *Kotteakos v. United States*, 328 U.S. 750, 759-60 (1946). "So great was the threat of reversal, in many jurisdictions, that a criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained." *Id.* at 759. Harmless error rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22; 5 Wayne R. LaFave et al., *Criminal Procedure* § 27.6(a), at 933-34 & n.5 (2d ed. 1999) (discussing history of adoption of harmless error as reaction to criticism of appellate courts as "'impregnable citadels of technicality'") (quoting Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925)).

Reviewing *Apprendi/Blakely* errors for harmlessness will not serve any useful purpose. There is no risk that, following an *Apprendi/Blakely* error, a conviction will be reversed and a

new trial will have to be had to authorize punishment of the defendant. The nature of the error is such that a perfectly valid conviction is always in place. The problem is that the prosecution (or the judge) is unsatisfied with the degree of punishment authorized by the crime charged and the jury's verdict. Recognizing *Apprendi/Blakely* errors as structural does not risk bringing the criminal process into disrepute by permitting individuals who have had an essentially fair trial to go free based on nothing more than any of the number of inevitable minor errors that will occur in any human endeavor as vast as the nation's criminal justice system. Nobody claiming an *Apprendi/Blakely* error has escaped conviction.

To the contrary, the risk to the criminal process is great not from failing to apply harmless-error analysis here, but rather from choosing to apply it. Defense counsel will come to recognize that their clients, charged with specific offenses that carry specific maximum penalties, nonetheless remain exposed to potentially increased punishment on the basis of facts that are not elements of the charged offense. In response, out of an abundance of necessary caution, counsel will vigorously dispute every fact upon which a judge might later base an enhanced sentence. Trials will cease to be the kind of orderly process focused on the jury's consideration of the elements of the offense. Jurors will sit through testimony and evidentiary presentations that have nothing to do with the matters they will be asked to consider. Trials will become unnecessarily longer and more confusing to jurors as they lose their focus.

Recognizing *Apprendi/Blakely* errors as structural will better ensure that the criminal process remains orderly and predictable, and that defendants will always know what facts are in dispute and what is at stake in terms of potential punishment. This Court should continue to give the Sixth Amendment the robust reading it deserves and conclude that *Apprendi/Blakely* errors are not subject to review for harmlessness.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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January 18, 2006

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No. 05-83

Supreme Court, U.S.
FILED
JAN 18 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

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QUESTION PRESENTED

Whether harmless-error analysis can apply to affirm a trial court's entry of a conviction of a greater crime than that charged by the government and proven to the jury beyond a reasonable doubt, where the jury's verdict is complete in every respect, and there has been no claim of insufficiency in the jury's verdict?

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BRIEF FOR RESPONDENT

STATEMENT

This case comes to this Court on the State's question presented of "[w]hether error *as to the definition of a sentencing enhancement* which results in a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is subject to harmless error analysis." Petitioner's Br. at i (emphasis added). This language, however, misrepresents the true nature of Washington law and the proceedings below. The Washington Supreme Court explained in no uncertain terms that the jury instruction defining the sentencing enhancement the State charged – a "deadly weapon" enhancement – "was the correct instruction" according to state law. Pet. App. 7a. The trial court erred not by misdefining any sentence enhancement, but by imposing a *different* (and more serious) enhancement, a "firearm" enhancement, than the State charged or the jury found. Indeed, this different enhancement could not have been presented to the jury even if the State had wanted to do so. Accordingly, the real issue here is whether the *Blakely* error that occurred in the trial court – which had *nothing at all* to do with how the jury was instructed on the sentencing enhancement that was presented to it – is subject to harmless-error review. The Washington Supreme Court correctly held that it is not.

1. Wash. Rev. Code § 9A.36.031 provides a person is guilty of second degree assault if under circumstances not arising to first degree assault he or she assaults another

with a deadly weapon. Wash. Rev. Code § 9.94A.533(4)[1] sets forth the length of additional confinement which a trial court must impose where there has been an allegation and special jury finding that a defendant was armed with a deadly weapon in the commission of a crime. Wash. Rev. Code § 9.94A.602 requires a special allegation and jury finding that a person is armed with a deadly weapon, and a jury finding of that fact. That statute also defines a deadly weapon as "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death," including "a pistol, revolver, or any other firearm." Wash. Rev. Code § 9.94A.602.

Wash. Rev. Code § 9.94.602 establishes a two-tiered definition of instruments which may be found to be deadly weapons. *State v. Samaniego*, 76 Wash. App. 76, 79-80 (1994). First, the statute defines the term to include "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." Wash. Rev. Code § 9.94.602. Second, the statute creates a "per se" class of deadly weapons, listing instruments which regardless of the manner in which they are used are deadly weapons. *Id.*; *see also*, *Samaniego*, 76 Wash. App. 79-80. This "per se" list includes firearms as well as any dagger, knife with a blade longer than three inches, or metal pipe or bar used as a club. If the jury returns a deadly weapon

[1] Many of the statutes at issue have been recodified since the time of Respondent's offense. For ease of reference and because the recodified statutes do not effect any substantive changes, Respondent will cite to the current statutes, except where citation to the former statute is necessary.

special verdict along with finding a defendant guilty of second degree assault, a Class B felony, Wash. Rev. Code § 9.94A.533(4)(b) provides for a mandatory additional term of 12 months confinement.

Wash. Rev. Code § 9.94A.533(3) provides for the imposition of a greater term of confinement where the jury finds the defendant committed the offense with a "firearm." In order to qualify as a "firearm," and not just a "deadly weapon," a gun must be capable of firing "a projectile or projectiles . . . by an explosive such as gunpowder." Wash. Rev. Code § 9.41.010. In other words, the gun must be operational. *See, e.g., State v. Padilla*, 95 Wash. App. 531 (1999) (an inoperable gun is not a "firearm"); *State v. Franklin*, 41 Wash. App. 409, 416 n.3 (1985) (starter pistol is not firearm because it is not capable of emitting a projectile). A firearm finding for a Class B felony requires the imposition of an additional 36 months confinement.

Unlike the provisions of Wash. Rev. Code § 9.94A.602 pertaining to "deadly weapon" findings, there is no statutory procedure in place that allows a jury to determine that a person was armed with a "firearm." Pet. App. 8a. Instead, in a series of cases, the Washington Court of Appeals concluded that whenever a defendant was charged with, and a jury returned a special verdict finding beyond a reasonable doubt that a "deadly weapon" was used in the commission of the crime, the trial court was required to determine whether the "deadly weapon" was a "firearm." *See State v. Meggyesy*, 90 Wash. App. 693 (1997), *review denied*, 136 Wash.2d 1028 (1998) (holding trial court has discretion to make firearm finding and impose greater sentence); *State v. Rai*, 97 Wash. App. 307, 312-13 (1999) (concluding if evidence indicates firearm involved,

trial court must make firearm finding and is required to impose greater sentence).[2]

2. The State filed an Information charging Arturo Recuenco with second degree assault with the allegation he was armed with a "deadly weapon" pursuant to former Wash. Rev. Code § 9.94A.125[3] and former Wash. Rev. Code § 9.94A.310.[4] J.A. 3. The Information described the deadly weapon as "a handgun," but it did not allege that the handgun amounted to a "firearm" or refer to the statutory definition of a firearm found in Wash. Rev. Code § 9.41.010. Nor did the Information contain any allegation that the firearm enhancement might apply. At the completion of trial, the trial court instructed the jury, consistent with the Information, on the definition of "deadly weapon" and asked the jury to find whether Respondent used a deadly weapon.

The jury returned a verdict finding Respondent guilty of second degree assault with a special verdict finding Respondent was armed with a deadly weapon during the commission of the second degree assault. J.A. 10, 13.

At sentencing, Respondent argued the court could only impose the additional 12-month confinement permitted by the jury's deadly weapon finding and not the 36 months which would be permitted under the firearm

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[2] The Washington Supreme Court, in its decision in this case, affirmed both *Meggyesy* and *Rai's* procedural interpretation of Wash. Rev. Code § 9.94A.602 but concluded the result they required violated the Sixth Amendment. Pet. App. 6a.

[3] Recodified as Wash. Rev. Code § 9.94A.602.

[4] Recodified initially as Wash. Rev. Code § 9.94A.510 and subsequently as Wash. Rev. Code § 9.94A.533.

enhancement statute. J.A. 43-44. Concluding that the evidence established Respondent was armed with a firearm, the trial court concluded it had no discretion but to impose an additional 36 month firearm enhancement instead of the 12 months permitted by the deadly weapon allegation and jury finding. J.A. 47. The court did not indicate whether it based its finding on proof beyond a reasonable doubt.

3. Respondent appealed the judgment, relying on this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), to argue his Sixth and Fourteenth Amendment rights to a jury finding beyond a reasonable doubt of each element of the offense were violated where the trial court imposed an additional term based upon a judicial finding that Respondent was armed with a firearm. After the Washington Court of Appeals affirmed the judgment, and while Respondent's petition for review was pending in the Washington Supreme Court, this Court issued its decision in *Blakely v. Washington*, 542 U.S. 296 (2005).

After the Washington Supreme Court accepted review of Respondent's case, the State of Washington conceded the trial court's finding was contrary to *Blakely* and *Apprendi* and violated Respondent's right to jury finding beyond a reasonable doubt. Pet. App. 6a-7a. The State argued, however, that any error was both invited and harmless. Petition 7a. The Washington Supreme Court rejected both arguments and vacated Respondent's sentence. The court found that harmless-error analysis could not be meaningfully applied to the error in this case because in the absence of a jury verdict, such analysis would be purely speculative as to what the jury might have done. Pet. App. 8a. (citing *State v. Hughes*, 154

Wash.2d 118, 142-45 (2005) (finding *Sullivan v. Louisiana*, 508 U.S. 275 (1993), analogous to a situation presented where judicial as opposed to jury findings are used to increase a defendant's sentence based on less than proof beyond a reasonable doubt). Moreover, the Washington Supreme Court in both *Hughes* and *Recuenco* concluded that because there was no statutory mechanism in place to permit the imposition of the aggravated sentences, and because the court was not free to graft such a mechanism onto the statute the only option left to the court was to remand the matters for sentences consistent with the jury's verdict. *See* Pet. App. 8a.

Respondent has completed his term of confinement in this matter including that required by the judicially made firearm finding.

SUMMARY OF ARGUMENT

1. Harmless-error review is impossible here because of an unusual circumstance under state law. The Washington Supreme Court made clear in the decision below that no statutory procedure existed at the time of trial, or exists now, that allows the State to plead and prove firearm enhancements to juries. Pet. App. 8a. Accordingly, the question that an appellate court is supposed to ask in reviewing an error for harmlessness – whether the jury "could reasonably find" the fact at issue, *Neder v. United States*, 527 U.S. 1, 16-19 (1999) – cannot legitimately be asked here. This Court, in other words, cannot sustain a judgment that the State could not have obtained at trial and could not even obtain today. Even if *Apprendi/Blakely*

errors could be harmless under other circumstances, there is no way they can be harmless here.

2. Even if state law did not preclude harmless-error review in this unusual case, the trial court's *Blakely* error still could not be harmless. Errors implicating *Apprendi* and *Blakely* are equivalent to a directed verdict in that the jury returns a complete verdict on the crime charged but the trial court makes a post-trial finding effectively setting aside that verdict and entering a judgment convicting the defendant of a greater offense. Such errors are not the same as the instructional error at issue in *Neder*. The error at issue in *Neder* concerned only the failure to instruct the jury on an element of the charged offense.

In this circumstance, harmless-error review is inappropriate for two independent reasons. First, it would violate the Sixth Amendment – and eviscerate *Blakely* itself – by permitting appellate judges to make factual findings that resulted in convictions for more serious crimes than the underlying jury verdicts. While appellate courts may make factual findings concerning omitted or misdescribed elements to *sustain* juries' verdicts, they may not make findings that subject defendants to *new* and greater punishment than jury verdicts do. Indeed, *Neder* itself noted that harmless-error analysis does not apply to directed verdicts. Second, applying harmless-error review would contravene this Court's "structural" error jurisprudence. *Blakely* error permeates a trial in a way that mere instructional error does not. The greater crime at issue is never charged and is not properly subjected to the adversarial process. Consequently, the error is not merely in "the presentation of the case to the jury" and therefore cannot "be quantitatively assessed in the context of the other evidence presented." *Sullivan*, 508 U.S. at 281.

3. Applying harmless-error review here also would not serve the prudential justifications for the doctrine. To the contrary, it would increase litigation in both Washington's trial and appellate courts. Instead of merely remanding cases involving *Blakely* error for mathematical adjustments to sentences, appellate courts would have to review the record in each case to estimate whether defendants actually committed certain conduct. And instead of focusing trials on the elements of the crimes charged, defense counsel will be duty-bound to contest every stray piece of incriminating evidence offered by the State, lest trial and appellate courts later rely on it to support more serious convictions, and longer sentences, than the State sought in charging the matter. The Washington Supreme Court's resolution of this case makes sound practical sense and should not be disturbed.

ARGUMENT

I. The Washington Supreme Court's Binding Construction Of The Sentencing Statutes Involved Here Renders Harmless-Error Review Impossible.

In order to rule that a constitutional error during trial court proceedings was harmless, an appellate court must find beyond a reasonable doubt that the error "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Neder v. United States*, 527 U.S. 1, 18 (1999) (court must find that a jury still "would have found the defendant guilty absent the error"). Such a finding is impossible to make here because, as the Washington Supreme Court has now made clear, no state-law procedure existed at the time of trial that would have

permitted the State to prove to a jury that Respondent was armed with a firearm when he committed his crime. The trial judge's decision to determine herself that Respondent used a firearm thus *necessarily* "contribute[d] to the verdict obtained." *Id.* Even if *Apprendi/Blakely* errors sometimes could be harmless, they cannot be harmless here.[5]

In order fully to understand why state law forecloses any possibility of applying the harmless-error doctrine here, it is necessary to begin with a careful review of the Washington Supreme Court's holding in *Hughes*, 154 Wash.2d 118, the other *Blakely*-type case it decided the same day as this one. In *Hughes*, the State requested that the Washington Supreme Court judicially rewrite the sentencing laws that this Court had invalidated in *Blakely*, so that in cases in which exceptional sentences had to be vacated the State on remand could plead and prove "aggravating factors" to juries. The court rejected the State's request. It explained that "[w]here the legislature has not created a procedure for juries to find aggravating factors and has, instead, [as here] explicitly provided for judges to do so," the only thing a Washington court has the power to do is to confirm that the existing procedure is invalid. *Id.* at 150. Alternately stated, when the legislature has set forth unconstitutional sentencing procedures, Washington courts lack the authority to create or imply new sentencing procedures that are constitutional. *Id.* at 149-50 (citing *State v. Ammons*, 105 Wash.2d

[5] As required by Rule 15.2, Respondent advised this Court in his brief in opposition of this obstacle to resolving the harmless-error issue over which the State claimed the federal and state courts were divided. *See* Br. in Opp. at 7-8.

175, 180 (1986); *State v. Monday*, 85 Wash.2d 906, 909-10 (1975)). Accordingly, the Washington Supreme remanded the case and ordered that Hughes be resentenced without respect to any aggravating facts. *Hughes*, 154 Wash.2d at 156.[6]

Since *Hughes*, the Washington Supreme Court and the Court of Appeals have continued to remand *Blakely*-violative sentences with instructions to resentence the defendants within applicable standard ranges. *See, e.g.*, *State v. Ose*, ___ Wash.2d ___, 2005 WL 3446360, at ¶ 22 (Wash. Dec. 15, 2005) ("remand[ing] for resentencing within the standard range"); *State v. Schimelpfenig*, 128 Wash. App. 224, 230 n.4 (2005) (same); *State v. Taylor*, 127 Wash. App. 945, 954 (2005) (under *Hughes*, "the proper remedy is to remand for resentencing in the standard range"). These decisions confirm that *Hughes* does not rest solely on Sixth Amendment or federal structural-error principles. If it did, then Washington courts would merely be vacating defendants' sentences and permitting the State on remand to decide whether to re-charge and re-try to a jury the aggravating factors at issue. *Compare, e.g.*, *Quintero v. Bell*, 256 F.3d 409, 416 (6th Cir. 2001) ("only appropriate remedy" for structural error is reversal to allow for a new trial); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000) (structural error "mandate[s] a new trial"); *United States v. Mortimer*, 161 F.3d 240, 242 (3d Cir. 1998) (same). But, instead, the Washington courts are precluding the State altogether from seeking to impose aggravated sentences on remand. *Hughes*' construction of

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[6] The State included an excerpt from *Hughes* in the appendix to its petition for certiorari, Pet. App. 20a-27a, but it did not include this section of the opinion.

Washington's underlying sentencing statutes has rendered the automatic harmless-versus-structural-error debate moot.

This case followed the same pattern in the Washington Supreme Court. The court first held that Washington's procedures for finding deadly weapon "sentencing enhancements" – like its procedures for finding "aggravating factors" – violated *Blakely*. Pet. App. 6a-7a.[7] The Washington Supreme Court then referenced *Hughes* and refused to "imply a procedure by which a jury can find [firearm] sentencing enhancements on remand," and it ordered that Respondent be resentenced without respect to any firearm finding. Pet. App. 8a.

To be sure, the State and the United States do not appear to read the Washington Supreme Court's decision this way. They suggest that former Wash. Rev. Code § 9.94A.125, which allows the State to prove "deadly weapon" enhancements to juries, also permits the State to plead and prove "firearm" enhancements to juries. Petitioner's Br. at 6 n.3, 26; United States Br. at 3. The United States calls this suggestion "critical[]." United States Br. at 3. But this proffered reading of § 9.94A.125 simply

[7] Washington's "sentence enhancements" and its "aggravating factors" appear in different parts of its sentencing code and operate in different ways. Sentence enhancements are akin to facts supporting "offense adjustments" under the Federal Sentencing Guidelines; they trigger mandatory increases in a defendant's standard sentencing range. *See* Wash. Rev. Code § 9.94A.533; *Blakely*, 542 U.S. at 299 (noting firearm sentencing enhancement in Blakely's case). Aggravating factors are akin to facts supporting "upward departures" under the federal guidelines; they allow trial courts, in their discretion, to impose a sentence above the standard range. *See* Former Wash. Rev. Code § 9.94A.535 (2004); *Blakely*, 542 U.S. at 299, 305 n.8.

cannot be squared with the Washington Supreme Court's decision. The Washington Supreme Court held *no* procedure in Washington law allows the State to prove firearm enhancements to juries, and the court refused to create one judicially. Pet. App. 8a. While the Washington Supreme Court might have been able to construe former Wash. Rev. Code § 9.94A.125's provision allowing the State to prove "deadly weapon" enhancements to juries to apply not just to one-year "deadly weapon" enhancements under Wash. Rev. Code § 9.94A.533(4), but also to longer "firearm" enhancements under Wash. Rev. Code § 9.94A.533(3), the Washington Supreme Court declined to do so.

It is axiomatic, of course, that the Washington Supreme Court's construction of state statutory law is binding here, even if this Court might think the state court could have construed the statute differently to avoid constitutional problems. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 61 (1999); *Id.* at 66-68 (O'Connor, J., concurring in part and concurring in the judgment). And that construction of state law, under state principles of statutory construction, reflects "what the statute has meant since its enactment." *State v. Moen*, 129 Wash.2d 535, 538 (1996); *accord In re Hinton*, 152 Wash.2d 853, 859-60 & n.2 (2004).

The upshot of the fact that there is no valid state-law procedure for imposing firearm sentencing enhancements is that it is impossible to conduct a harmless error inquiry in *any* case in which a trial court imposed such an enhancement. The State and the United States, simply put, are asking this Court to reimpose a sentence that the State could not properly have obtained at trial and that it could not obtain on remand, no matter what the facts of the case might be. Indeed, the State could not even obtain

the sentence it seeks if it charged Respondent for the first time today; the Washington Legislature has not enacted any new law allowing the State to plead or prove firearm enhancements to juries. Accordingly, harmless-error doctrine cannot be invoked here. There is no legitimate way to ask whether a jury "could reasonably find" that Respondent used a firearm, *see Neder*, 527 U.S. at 16-19 because state law prohibited, and still prohibits, juries from making such findings.[8]

This Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), reinforces the impossibility of conducting a harmless error inquiry here. In *Jackson*, this Court held that the Federal Kidnapping Act violated the jury trial right because it provided that defendants were eligible for the death penalty only if they insisted on a jury trial. This Court further held that it lacked the power to rewrite the

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[8] Shortly after *Hughes* was issued, the Washington Legislature did enact new legislation allowing the State to plead and prove "aggravating factors" to juries. *See* 2005 Wash. Legis. Serv. 68 (West). The State then sought rehearing in *Hughes*, arguing that the new legislation gave it the right to seek to reimpose Hughes' exceptional sentence on remand. The Washington Supreme Court denied this motion without comment. Order Denying Reconsideration at 1, *State v. Hughes* (Wash. July 26, 2005) (unpublished order). But even if a Washington court later concluded that the new "aggravating factors" legislation somehow does apply retroactively, such a holding would not affect this case, since there is no new legislation dealing with firearm enhancements.

It is true that before the Washington Supreme Court issued its decision in this case, trial courts in some Washington counties allowed the State to charge and prove firearm enhancements to juries. Defense trial counsel here, in fact, suggested at one point that the State might have been able to do so here. *See* J.A. 37-38. But in light of the Washington Supreme Court's construction of the relevant statutes in the decision below, it is clear as a matter of state law that the State cannot now, and was not permitted to then, charge and prove firearm enhancements to juries.

Act in order to allow the government to keep seeking the death penalty in such cases. In language the Washington Supreme Court repeated in *Hughes*, 154 Wash.2d at 150, this Court explained:

> It is one thing to fill a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality. . . . This we decline to do.

Jackson, 390 U.S. at 580-81; *see also id.* at 585 ("[T]he capital punishment provision of the Federal Kidnapping Act cannot be saved by judicial reconstruction."). Having concluded that it lacked the power to create a valid procedure under the Act for imposing the death penalty, this Court held in no uncertain terms that "[t]he appellees may be prosecuted for violating the Act, *but they cannot be put to death under its authority.*" *Id.* at 591 (emphasis added). In other words, no death sentence imposed under the Act could later be validated by the harmless-error or any other doctrine.

Precluding harmless-error review here also comports with the purposes of the harmless-error doctrine. That doctrine, as the State recognizes, is designed to "conserve[] judicial resources by preventing costly, time-consuming and unnecessary remands, and thus . . . [to] reduc[e] the number of cases on trial court dockets." Petitioner's Br. at 15; *see also United States v. Hasting*, 461 U.S. 499, 509 (1983) (the "goal" of the harmless-error doctrine is to "conserve judicial resources"); *cf. Neder*, 527 U.S. at 15 (considering what would happen on remand).

But *foreclosing* harmless-error review here, not allowing it, serves those goals. The Washington Supreme Court's construction of state law means that Respondent is entitled to an administrative adjustment to his record of conviction and a two-year reduction of his sentence. No new trial will occur; Respondent's conviction for second degree assault remains intact. The only way significant additional judicial resources would be expended in Respondent's case and others like it is if this Court somehow said that the State *could* litigate in the future whether erroneous firearm enhancements are harmless.

This Court, in short, has never applied the harmless-error doctrine to allow the government to obtain a result it could not have obtained in the first instance without violating the Constitution and it could not, even theoretically, obtain on remand. There is no legal or prudential justification for doing so here.

II. Even If State Law Did Not Preclude Harmless-Error Review Here, The Trial Court's *Blakely* Violation Could Not Have Been Harmless.

The absence of any Washington procedure for pleading and proving the basis for a firearm enhancement to a jury forecloses applying the harmless-error doctrine here. But even if the Washington Supreme Court had read the pertinent state sentencing statutes to permit such proceedings in the future, harmless-error review would still be inappropriate. *Blakely* errors are not susceptible to harmless-error review.

A. The Error In The Trial Court Was Not An Instructional Error.

This Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact, other than the fact of a prior conviction, which increases the statutory maximum penalty to which the defendant is exposed must be proved to a jury beyond a reasonable doubt. *Id.* at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court clarified that the "statutory maximum" for purposes of *Apprendi* is the maximum sentence to which the defendant could be sentenced based on the jury's verdict. *Id.* at 303-04.

In the Washington Supreme Court, the State "concede[d] the existence of a *Blakely* Sixth Amendment violation," and the court accepted that concession, holding "the [trial] court's imposition of a firearm enhancement violated Respondent's jury trial right as defined by *Apprendi* and *Blakely*." Pet. App. 6a. The State's petition for certiorari was consistent with this concession and holding, advocating the need to resolve a conflict in the lower courts over whether "*Blakely* error" is subject to harmless-error analysis. Pet. 7, 10-14. And the United States, as *amicus curiae*, recognizes that the trial court here violated *Blakely*. United States Br. at I, 5, 7, 9.

Nonetheless, the State now suggests the error here was nothing more than an "[i]mprecise" or "erroneous jury instruction" with respect to the firearm sentencing enhancement. Petitioner's Br. at 8; *see also id.* 18 (suggesting error was "incomplete verdicts caused by erroneous sentencing factor instructions"). Its question presented further muddies the water by suggesting that what occurred below was "an error in the definition of a sentencing enhancement which result[ed] in a violation of [*Apprendi*

and *Blakely*]." *Id.* at i. Not only do these suggestions backtrack from prior concessions and representations, but they are incorrect. The Washington Supreme Court explained in no uncertain terms this case does not involve any "instructional error":

> Respondent did *not* and does *not* assert the special verdict form asking the jury to find the presence of a deadly weapon was error. Indeed he proposed that instruction because he believed and continues to believe that it was the *correct* instruction for the charge of second degree assault with a deadly weapon enhancement. Instead, Respondent claims that the judge's *imposition of the firearm enhancement without the jury's finding the existence of a firearm* was an error violating his due process and jury trial rights.

Pet. App. 7a-8a (emphasis added). The Washington Supreme Court held that just the kind of error that Respondent alleged – pure *Blakely* error – had occurred.

This kind of constitutional error has nothing to do with instructional error. In a case involving instructional error, the trial court errs by failing to instruct (or improperly instructing) the jury concerning an element of a crime. Ordinarily, an underlying criminal statute or constitutional provision requires that the jury be instructed (or that it be instructed in a certain way) but the trial court fails to abide by the statute. *See, e.g., Neder*, 527 U.S. at 20-25 (statute required jury to be instructed on materiality); *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (First Amendment did not permit instructing to consider community standards in assessing value of material in obscenity prosecution); *Carella v. California*, 491 U.S. 263,

265-66 (1989) (instruction created mandatory presumption in violation of Fourteenth Amendment's Due Process Clause).

But in a case, as here, involving *Blakely* error, the trial court does not contravene any statutory command. Rather, the trial court follows a statute that tells the court that it should not (or at least need not) instruct the jury concerning a certain fact, and instead that it may find that fact itself after the jury already has delivered its verdict. *See supra* at 8-11 (Washington law does not permit courts to instruct juries to find use of firearm for purposes of enhancement); *State v. Meggyesy*, 90 Wash. App. at 707 (courts, not juries, must find presence of firearm); *State v. Rai*, 97 Wash. App. at 312-13 (same). It just turns out that the statute, when applied that way, violates the Sixth Amendment. Pet. App. 6a.[9]

Put another way, the error in the trial court here was not that its "deadly weapon" instruction was somehow imprecise or inadequate. The error was that after the State charged and the jury found Respondent guilty of second degree assault with a deadly weapon the judge convicted him of the more serious crime of second degree

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[9] Of course, in some cases an appellate court can cure that problem for future cases by either rewriting the statue or implying different procedural protections. *See, e.g., United States v. Booker*, 125 S. Ct. 738, 764-68 (2005) (judicially curing *Blakely* problem in the way federal sentencing guidelines had been interpreted) *United States v. Buckland*, 289 F.3d 558, 563-68 (9th Cir. 2002) (en banc) (judicially curing *Apprendi* problem in the way that federal drug statute had been interpreted). While such appellate action distinguishes those cases from this one by avoiding the impossibility of applying harmless-error review as described *supra* in Part I, such action does not erase the fact that *Apprendi / Blakely* error occurred in the case on review.

assault *with a firearm*. While all firearms are deadly weapons under Washington law, not all deadly weapons – not even all guns – are "firearms." In order to constitute a "firearm," a gun must be capable of firing "a projectile or projectiles . . . by an explosive such as gunpowder." Wash. Rev. Code § 9.41.010. In other words, the gun must be capable of working. *See State v. Padilla*, 95 Wash. App. 531 (an inoperable gun is not a "firearm"); *State v. Franklin*, 41 Wash. App. at 416 n.3 (starter pistol is not firearm because it is not capable of emitting a projectile). While the State charged (and presented evidence) that Respondent was armed with a "handgun," it never charged, and the jury never found, that the Respondent used a "firearm." J.A. 3, 5 (third amended information and trial memorandum); J.A. 31, 38 (defense counsel noting that "there was no evidence given that this weapon could or was at least designed to fire a projectile by explosive such as gunpowder"). Only the trial court made that finding.

In sum, the *Blakely* error here – like any *Blakely* error – is different in kind from mere instructional error. Unlike the case of an instructional error, the State did not allege the fact at issue in the charging instrument. And unlike the case of an instructional error, the jury found the defendant guilty of a complete crime, yet the trial court made a post-trial finding that effectively set that verdict aside and entered a judgment convicting Respondent of a more serious crime. Both of those things distinguish the trial court proceedings from the proceedings in *Neder*.

B. A *Blakely* Violation Is Tantamount To A Directed Verdict Convicting The Defendant Of A Greater Offense.

In assessing the impact of a *Blakely* error on trial court proceedings, the best way to understand the effect of such an error is to perceive that the trial court has directed the verdict convicting the defendant of a greater offense than charged or proven to the jury.

The State properly recognizes that "[f]or Sixth Amendment purposes, sentencing enhancements that impose punishment above that authorized by the jury's verdict are the 'functional equivalent' of elements of an offense." Petitioner's Br. at 19 (quoting *Apprendi*, 530 U.S. at 494 n.19); *see also Blakely*, 542 U.S. at 311 (repeatedly referring to such facts as "elements"); *Harris v. United States*, 536 U.S. 545, 557-58 (2003) ("those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of the constitutional analysis").

But that is just the half of it. As this Court made clear in *Apprendi*: "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a *greater offense* than the one covered by the jury's verdict." 530 U.S. at 494 n.19 (emphasis altered); *see also Ring*, 536 U.S. at 609 (aggravating circumstance that makes a defendant eligible for increased punishment "operates as the functional equivalent of an element of a *greater offense*") (emphasis added). The trial court in this case thus violated the Sixth Amendment by convicting Respondent of "a greater offense than the one covered by the jury's verdict." *Apprendi*, 530 U.S. at 494 n.19.

This is another way of saying that the trial court entered a directed verdict convicting Respondent of a greater offense than the State charged or proved to the jury. From the jury's earliest origins, it has been understood that "it is the conscience of the jury that must pronounce the prisoner guilty or not guilty." 2 Sir Matthew Hale, *The History of the Pleas of the Crown* 312-13 (1736). The jury must always be given the opportunity to acquit a defendant of criminal accusation, and if the jury issues an acquittal, it "cannot be set aside," no matter what the evidence showed. *Sparf & Hansen v. United States*, 156 U.S. 51, 106 (1895); *accord Clark v. United States*, 289 U.S. 1, 16-17 (1933); *see also* 4 William Blackstone, *Commentaries on the Laws of England* 361-62 (1768). Accordingly, this Court has long held the Sixth Amendment prohibits a court from "do[ing] indirectly that which it has no power to do directly," *id.* – that is, directing a guilty verdict in a criminal case:

> A trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, *see* [*Sparf & Hansen v. United States*, 156 U.S. at 105]; *Carpenters v. United States*, 330 U.S. 395, 408 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); *Rose v. Clark*, 478 U.S. 570, 578 (1986) (same); *Connecticut v. Johnson*, 460 U.S. 73, 83 (1983) (plurality opinion) (same) *see also Standefer v. United States*, 447 U.S. 10, 21-25 (1980) (double jeopardy principles do not permit the state to seek a judgment not withstanding the verdict

no matter how clear or strong the evidence of guilt); *see generally* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 48-65 (2003) (reviewing historical sources regarding inability of judges to substitute their views for jury verdicts).

Just as in the case of a directed verdict, the trial court in this case entered judgment convicting Respondent of a crime that the jury did not find that he committed. The trial court did so because *it* found that Respondent committed that crime. While the State presented evidence during trial that Respondent was armed with a handgun, the jury (even assuming the "deadly weapon" it found was the handgun) was never allowed to pass judgment on whether Respondent should be convicted for the crime of second degree assault *with a firearm*. It did not even find that the handgun met the narrower statutory definition of a firearm, Wash. Rev. Code § 9.41.010.

The trial court's actions were no different, for constitutional purposes, than if it had found a defendant guilty of murder after the prosecution charged the defendant only with manslaughter. In such a scenario the error is plainly not merely the failure to instruct the jury on the heightened *mens rea* of murder. The error instead is that the court has directed verdict for the government. Such an error is not lessened to any appreciable degree if the jury has found all of the elements but premeditated intent or if the trial court makes its finding on proof beyond a reasonable doubt.[10]

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[10] It is true in a prosecution of first degree murder by premeditated intent in the State of Washington that proving premeditated intent

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Here, as in the manslaughter/murder scenario, the fact that the jury found Respondent guilty of a lesser offense – in contrast to some scenarios in which trial courts might enter directed verdicts – means that the State did obtain some kind of valid conviction. But it was not the one on which the trial court entered judgment and for which it sentenced Respondent. Consequently, the trial court's judgment must be understood as a directed verdict.

C. A Directed Verdict Cannot Be Subjected To Harmless-Error Review, So Neither Can A *Blakely* Error.

Because the *Blakely* error here was tantamount to directing a verdict finding Respondent guilty of a greater offense, the remedy for that violation should comport with the remedy for entering a directed verdict. That remedy is an automatic reversal. To hold otherwise would (1) violate the Sixth Amendment and (2) contravene this Court's structural-error jurisprudence.

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necessarily establishes the lesser included *mens rea* of recklessness. *See, e.g.*, *State v. Warden*, 133 Wash.2d 533, 562-63 (1997) (first and second degree manslaughter are lesser included offenses of first degree premeditated murder). If the State charges the individual with premeditated murder, the parties proceed to trial understanding the charged offense and the proof required, and the State presents facts to support the heightened intent element, but the court fails to instruct the jury that it must find premeditated intent, then that error may be deemed harmless under *Neder*. But it is something altogether different if the State only charges manslaughter, the parties try the case on that charge, the jury returns a verdict on that charge, but the court, upon considering the strength of the case the State put before the jury, imposes a conviction of first degree murder. In the former scenario, the error can be fairly said to be an omitted instruction. But in the latter it is not. It is a directed verdict.

1. The Sixth Amendment Prohibits An Appellate Court From Finding A *Blakely* Error Harmless.

Regardless of whether *Blakely* error is "structural" error, the Sixth Amendment prohibits an appellate court from finding such an error harmless. In the modern era of harmless-error review, this Court was first confronted with a government's request to uphold a criminal conviction unsupported by jury findings in *Bollenbach v. United States*, 326 U.S. 607 (1946). There, the defendant was convicted of a conspiracy charge, but this Court ruled that the trial judge misinstructed the jury on a key component of the crime. The government argued the verdict should nevertheless be sustained on appeal because "abundant evidence" in the record indicated that the defendant violated the statute. *Id.* at 614. This Court, per Justice Frankfurter, rejected this argument: "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." *Id.* An error cannot be harmless, this Court continued:

> if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress [in enacting the federal harmless-error statute] intended to substitute the belief of appellate judges in the guilt of the accused, however justifiably engendered by the dead record, for the ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Id. at 615. Allowing an appellate court to substitute its factual findings for a jury's, in other words, would violate the Sixth Amendment just as much as allowing a trial court to do so.

About forty years later, in *Rose v. Clark*, 478 U.S. 570 (1986), this Court clarified the general language in *Bollenbach* and held that merely instructional errors could be found harmless on appeal. In particular, when the jury actually has "pronounce[d] the prisoner guilty," 2 Hale, *supra*, at 312-13, an appellate court may conclude that an instructional error had no effect on the verdict. "The legal verdict of the jury, to be recorded, is finding for the plaintiff or the defendant; what they answer, if asked, to questions concerning some particular fact, is not of their verdict essentially." *Bushell's Case*, Vaughn 150, 124 Eng. Rep. 1006, 6 *Howell's State Trials* 999 (1670). Thus, even if a jury was improperly instructed with respect to some particular element, the presence of the jury's ultimate determination of guilty allows an appellate court to determine that the error was harmless.

But this Court sharply distinguished the situation of a directed verdict:

> [H]armless error presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. . . . Where [the Sixth Amendment's right to trial by jury] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Id. at 578; *see also Carpenters*, 330 U.S. at 408 (appellate court cannot sustain directed verdict, "[n]o matter how

strong the evidence may be"). The Sixth Amendment, in short, permits an appellate court to make findings in order to *sustain* a jury's guilty verdict. But neither a trial court nor appellate court may make findings of the defendant's guilt of a *new crime.*[11]

That is exactly what happened here; the "wrong entity," *Rose*, 478 U.S. at 578, found Respondent guilty of the greater crime of second degree assault with a firearm. To be sure, the jury found Respondent guilty of the lesser offense of second degree assault with a deadly weapon. But the trial judge set aside that verdict and entered a new one convicting Respondent of a greater offense. Just as the Sixth Amendment prohibits the trial court from directing a verdict for such a greater offense, it likewise prohibits an appellate court from making factual findings to the same effect, because it still deprives the defendant of his right to have a *jury* pronounce whether he is guilty of that offense. The directed verdict here must be vacated and the case must be returned to the trial court for re-entry of the jury's verdict.

Nothing in *Neder* is to the contrary. There, this Court held that an appellate court could conduct harmless-error review in order to *uphold a jury verdict* when the jury was not instructed that it had to find a certain element of a

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[11] Not only would such action violate the Sixth Amendment, but it also would raise serious double jeopardy problems. It is well settled that once a defendant has been convicted of a lesser offense, the State may not seek a conviction for a greater offense. *See, e.g., United States v. Dixon*, 509 U.S. 688 (1993); *Brown v. Ohio*, 432 U.S. 161 (1977). If an appellate court could uphold a directed verdict on a greater offense after the jury already had convicted the defendant on a lesser offense, the government would be able to obtain on appeal what it could not obtain in a subsequent trial if the defendant had not appealed.

crime. But this Court made plain that its holding covered only "the narrow class of cases like the present one." *Id.*, at 17 n.2. *Neder* thus stands solely for the proposition that an appellate court may conduct harmless-error review with respect to an "incomplete verdict" so long as the jury was allowed at trial to perform its "constitutional responsibility" of "draw[ing] the ultimate conclusion of guilt or innocence." *United States v. Gaudin*, 515 U.S. 506, 514 (1995). But the Sixth Amendment forbids extending *Neder* to situations in which an appellate court would need to "hypothesize a guilty verdict that [the jury] never in fact rendered." *Sullivan*, 508 U.S. at 279.

Indeed, the defendant in *Neder*, as well as this Court's dissenting Justices, contended that if this Court allowed appellate courts to find omitted elements of crimes, the next step could be that this Court would "allow a directed verdict against a defendant in a criminal case contrary to *Rose v. Clark*, 478 U.S. 570, 578 (1986)." *Neder*, 527 U.S. at 17 n.2; *see also id.* at 34 (Scalia, J., concurring in part and dissenting in part). This Court, however, made clear that it would not extend harmless-error review to such a situation: "We have no hesitation reaffirming *Rose* at the same time that we subject the narrow class of cases like the present one to harmless-error review." *Id.*

This conclusion was sound, and it is all that is necessary to decide this case. The Framers intended the Sixth Amendment's jury-trial guarantee to be a bulwark not just against judges directing verdicts in the classic sense but also against judges' punishing defendants for greater crimes than juries found them guilty of. *See* Barkow, 152 U. Pa. L. Rev. at 78-79 (gathering historical sources showing that Framers intended juries to have unreviewable authority to convict on lesser offenses, no matter

what the evidence a trial showed); Thomas A. Green, *Verdict According to Conscience* xv-xix (1985) (describing such judicial power in common-law England); *cf. United States v. Powell*, 469 U.S. 57, 63-66 (1943) (inconsistent verdicts unreviewable in criminal cases when juries issue partial acquittals as acts of lenity); *Dunn v. United States*, 284 U.S. 390, 394 (1932) (same; such verdicts "cannot be upset"); *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly, J.) (juries may issue verdicts "in the teeth of both law and facts . . . to prevent punishment from getting too far out of line with the crime") (quotation omitted). Accordingly, this Court explained in *Blakely* that the Sixth Amendment requires juries to be interposed as a "circuitbreaker" between defendants and trial judges not just with respect to entire crimes but also with respect to facts that are the functional equivalent of elements of greater offenses. *Blakely*, 542 U.S. at 306-07; *see also Apprendi*, 530 U.S. at 494 n.19.

The same is true with respect to appellate judges. Such judges likewise are "part of the State." *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). And they are just as apt to be "perhaps overconditioned or biased," *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), or be "compliant," "eccentric," or "too responsive to a higher authority." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Accordingly, the right to "jury trial is meant to ensure [the people's] control over *the judiciary*," *Blakely*, 542 U.S. at 306, not just trial judges. The Framers were loathe to "entrust plenary powers over the life and liberty of citizens to one judge or group of judges," *Duncan*, 391 U.S. at 156, regardless of what kind of court they sat on.

Allowing an appellate court to make factual findings to uphold a trial court's decision convicting a defendant of

a greater crime than the jury did would trample this understanding of the Sixth Amendment. *See Sullivan*, 508 U.S. at 279. Indeed, reversing here would eviscerate the holding of *Blakely* itself. It would allow courts in states like Washington to continue to make factual findings that increase defendants' sentences, so long as when the defendants appealed the states' appellate judges agreed with the trial judge's assessment of the record. In cases like *Blakely*, it would allow courts to accept defendants' guilty pleas and then enter convictions and sentences for greater offenses – again, so long as an appellate court agreed that the record supported the findings necessary for the more serious conviction. Surely *Apprendi* and *Blakely* cannot be circumvented by transferring factfinding responsibility from trial judges to appellate judges.

What is more, if harmless-error review is permissible here, there is no reason why it would not be permissible in a situation in which the State charged and obtained a guilty verdict for manslaughter, but the judge then decided that the evidence showed premeditated intent and entered a conviction for murder. In that situation, just like the one here, the trial court's error would be that the verdict "did not encompass a single element"– the element that creates the greater offense. Petitioner's Br. at 9; *see also* United States' Br. at 7 (seeking rule that "the failure to obtain a jury finding on an element of an offense" is always susceptible to harmless-error review). Whenever, in fact, a trial judge concluded after hearing the evidence that the State undercharged the case, the judge could *sua sponte* enter a conviction on a greater offense, and that conviction would be upheld if the appellate court agreed that the record showed that the defendant committed the greater offense.

The manslaughter/murder scenario is different from this case in the respect that no statutory scheme exists in Washington inviting judges to enter such directed verdicts. But that difference only makes this case worse. An unconstitutional judicial action is doubly harmful when accompanied by an unconstitutional legislative action. Put another way, if the presence of underlying legislation could somehow cleanse directed verdicts for purposes of appellate review, then all states would need to do would be to pass laws saying that when trial judges believe the evidence in a criminal case establishes a more serious crime than the State charged and the jury found, the trial judges have the power to convict the defendant of the more serious crime. The harmless-error doctrine should not backhandedly encourage states to enact such unconstitutional legislation.

The right to trial by jury in criminal cases reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 508 U.S. at 281. Juries must be given the opportunity to decide whether to convict a defendant of a given offense before he may be punished for it. Accordingly, courts may *uphold* jury verdicts, but the Sixth Amendment prohibits them from entering or approving of a judicial decision to convict a defendant of a more serious crime than the jury did. That time-honored principle requires affirmance here.

2. *Blakely* Error Is "Structural Error."

Even if the Sixth Amendment somehow permitted harmless-error review of *Blakely* errors, this Court's structural error jurisprudence would prohibit it.

The State spends most of its brief maintaining that the error in the present case is for all purposes the same as that in *Neder*: "This case does not present the issue of whether to extend *Neder* or apply it to a slightly different context; it merely involves an application of the *Neder* and [*Mitchell v.*] *Esparza*[12] rules." Petitioner's Br. at 18. But, as the United States recognizes, because *Blakely* error is not of the same stripe as the error in *Neder*, the State is in fact seeking an extension of its harmless-error analysis. United States Br. at 14. The United States is correct that this case is different than *Neder*, but, contrary to the United States' argument, the error here is not susceptible to harmless-error review because it is structural.

Neder involved a situation where the defendant was charged with filing a false federal tax return and mail fraud, where both parties understood the government would be required to prove the materiality of the misstatements in the tax return. 527 U.S. at 5-6. However, because the case was tried shortly before this Court's decision in *Gaudin*, clarifying that materiality was an element of the offense to be submitted to the jury, the trial court in *Neder* removed the question of materiality from the jury. *Neder*, 527 U.S. at 6. This Court concluded while the error led to an incomplete verdict, that error could be subjected to harmless-error analysis. The Court noted

> Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected impartial jury

[12] *Mitchell v. Esparza*, 540 U.S. 12 (2003) (concluding that in light of harmless-error "*precedent from this Court[which] is, at best, ambiguous*" state court decision was not unreasonable application of Supreme Court law and thus petitioner not entitled to habeas relief.)

> was instructed to consider all of the evidence and argument in respect to Neder's defense against the tax charges.

Id. at 10. In such a case, this Court concluded the trial court's failure to submit a single element to the jury could be subjected to harmless-error analysis. *Id.*

From this holding, the State argues that *Blakely* errors as a class are the equivalent of the error in *Neder* and thus subject to harmless error. The State faults the Washington Supreme Court for "believ[ing] . . . that harmless error analysis [is] permissible for incomplete verdicts caused by faulty elements instructions, [but] harmless error analysis was not permissible for incomplete verdicts caused by an erroneous sentencing factor instructions." Petitioner's Br. at 18 (citing *Hughes*, 154 Wash.2d at 148). Such a claim ignores the holding of the Washington court in *Recuenco*, that there was no error in the instructions or verdict, Pet App. 8a, and mischaracterizes the facts and holding of *Hughes*.

A review of the facts of *Hughes* illustrates, its holding, like the holding in this case, had nothing to do with erroneous instructions or an incomplete verdict. Daniel Hughes was charged and tried for first degree theft for illegally logging old-growth cedar trees. *Hughes*, 154 Wash.2d at 129. Pursuant to Wash. Rev. Code § 9A.56.030 a person is guilty of first degree theft where he takes the property of another with a value in excess of $1,500. At trial the jury heard the testimony of a forest technician that the value of the trees Hughes was accused of illegally logging was $4,465. *Hughes*, 154 Wash.2d at 129. The jury convicted Hughes of the charged offense and he faced a standard range sentence of 3 to 9 months. *Id.* At the sentencing hearing, however, the court heard testimony

from a United States Forest Service ecologist that the monetary and ecological components of the theft had an actual value of $145,599. *Id.* Based upon this testimony the trial court concluded a sentence of 90 months was appropriate based on five aggravating factors including: (1) the facts substantially distinguished the crimes from other thefts; (2) the offense was a major economic offense based on the actual value lost; and (3) the harm to the environment was severe. *Id.* at 129-30. The facts supporting the conviction of the greater offense – principally the value and ecological damage – were never put before the jury. The jury was never permitted to hear much less consider the evidence on which the court relied at sentencing or to consider any potential defenses to those claims.[13] And, of course, the jury was never provided instructions asking it to determine whether the State had proven beyond a reasonable doubt the acts were a major economic offense or caused severe environmental damage.[14]

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[13] Under Washington law prior to *Blakely* an aggravating factor supporting an exceptional sentence was legally sufficient only if it was not taken into account by the Legislature in defining the standard range, and thus could not be supported by a fact necessary to support the conviction of the substantive offense. *State v. Grewe*, 117 Wash.2d 211, 215-16 (1991). Thus, by definition the facts supporting an aggravating factor were not considered by the jury in reaching its verdict, nor necessarily presented to the jury.

[14] "Major economic offense" is a statutorily defined aggravating factor which may be based on a finding that the loss was more than "substantially greater than typical" or that the offense "involved a high degree of sophistication." The Washington Supreme Court has held in applying aggravating factors at trial, and reviewing them on appeal, courts cannot engage in proportionality and instead the trial judge's subjective view of the appropriateness of the aggravating factor control. *State v. Solberg*, 122 Wash.2d 688, 702-04 (1993). The court has rejected attacks that such an inherently subjective procedure violates the vagueness doctrine of the Fourteenth Amendment's Due Process

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Contrary to the State's claim, in neither *Hughes* nor this case, has the Washington Supreme Court even addressed a scenario of an incomplete verdict on a sentencing factor, much less concluded such a verdict can never be harmless.

Further undercutting the State's view that *Blakely* errors are synonymous with the error in *Neder* is the scenario where *Blakely* errors occur after a guilty plea where the defendant has either not been told that the State will seek a sentence on a greater offense or the defendant has not waived his rights to a jury determination of the additional facts beyond a reasonable doubt. In such a scenario, a defendant could claim the failure to inform him of the elements of the greater offense upon which the trial entered judgment, rendered his guilty plea involuntary, as a "plea could not be voluntary in the [constitutional] sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976) (citing *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Accepting that the facts which implicate *Blakely* are at least the functional equivalent of the elements of a greater offense, where a defendant is not informed of these additional elements in entering a guilty plea he has not been informed of "the true nature of the charge." *See Smith*, 312 U.S. at 334. While constituting *Apprendi/Blakely* error, such an involuntary plea is fundamentally a different type

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Clause, not because the factors are not vague, but because the court concluded the vagueness doctrine only applies to elements and not sentencing factors. *State v. Baldwin*, 150 Wash.2d 488, 457-59 (2003).

of error than in *Neder*, or the error in this case. Nor can *Neder* apply such that the error may be deemed harmless. Instead, either the sentence must be vacated or the defendant must be permitted to withdraw it, regardless of the strength of the evidence of guilt the government possesses, or the soundness of counsel's advice to enter the plea. *Henderson*, 426 U.S. at 644-45.

In sum, *Blakely* errors are different in kind from mere instructional error. Unlike *Neder*, in Respondent's case, as in *Hughes*, the error is the failure to conduct a trial in any constitutional sense of the offenses on which the court ultimately entered convictions.[15]

The doctrine of harmless error "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Harmless-error analysis "presupposes a trial, at which the defendant, represented by counsel may present evidence and argument before and impartial judge and jury." *Rose*, 478 U.S. at 578.

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[15] Contrary to the State's suggestion (Petitioner's Br. at 23-24), nothing in this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), suggests harmless-error review is appropriate here. That case involved an application of the plain-error doctrine, not the harmless-error doctrine. Holding that defendants are not entitled to reversal when they fail to object to *Apprendi* violations does nothing more than confirm that *Apprendi* rights can be waived. *See, e.g.*, *Blakely*, 542 U.S. at 310; *Neder*, 527 U.S. at 33-34 (Scalia, J., dissenting). Just because an error permeates a trial from start to finish does not necessarily mean that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 469 (1997) (quotation omitted).

In this case, the proceedings "produce[] 'consequences that are necessarily unquantifiable and indeterminate.'" *Neder*, 527 U.S. at 11 (citing *Sullivan*, 508 U.S. at 281-82). The jury was never allowed to resolve the factual question of the defendants' guilt on the greater offenses, not because they were not instructed on the element, but because the facts necessary to support the element of the greater offense were not litigated to the jury, i.e., that the handgun was capable of firing. *See* J.A. 30, 38. So too in *Hughes* the jury was never presented with the facts necessary to support the conclusion that Mr. Hughes' actions caused substantial ecological damage to a degree not contemplated by the legislature as the state did not present that evidence until after the jury had returned its verdict. In each instance the "central purpose of [the] criminal trial" has been frustrated as the jury was not presented with nor permitted to resolve the "factual question of the defendant's guilt or innocence." The error here prevents the jury from finding the defendant guilty of the crime of conviction, both factual and legally. *See*, *Sullivan*, 508 U.S. at 283-84 (Rehnquist, C.J., concurring). The error is not merely in "the presentation of the case to the jury" and therefore cannot "be quantitatively assessed in the context of the other evidence presented." *See Sullivan*, 508 U.S. at 281 (citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).

The analysis in *Rose* illustrates this. There the Court concluded an erroneous instruction which shifted the burden of proof by requiring the jury to presume malice if it found certain facts had been proven and the defendant had not rebutted the presumption was harmless. 478 U.S. at 582. In reaching its decision the Court concluded that even before the jury could apply the erroneous presumption it

was required to and had necessarily found the facts from which the presumption arose beyond a reasonable doubt. *Id.* at 581. Thus, the jury had found "'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Id.* (quoting *In re Winship*, 397 U.S. 364 (1970)). But here the parties never litigated the question of whether the handgun met the standard of a "firearm" and thus the jury did not find every fact necessary to establish every element of the offense beyond a reasonable doubt.

The error in this case lies in the "constitution of the trial mechanism," *Sullivan*, 508 U.S. at 281, and is thus structural.

III. The Prudential Reasons For Applying The Harmless-Error Doctrine In Instructional Error Cases Are Absent Here.

Not only is there no legal justification for applying the harmless-error doctrine here, but there is no practical justification either. The State cites eighteen harmless-error cases on pages 12-13 of its brief. The issue in fifteen of those cases was whether to reverse a defendant's conviction, thereby requiring a new trial. The issue in the other three was whether to reverse a death sentence, thereby requiring a new sentencing trial. Neither is at stake in this case. The sole issue here is whether the record of Respondent's conviction for second degree assault will reflect that he used a firearm or a deadly weapon, thereby determining whether his official prison term – which he already has completed – will be recorded as 15 months or 39 months.

The only way that further litigation will take place in this case and others like it is if this Court decides that the *Blakely* error here is subject to harmless error.[16] In that instance, parties will clog appellate courts with such harmless-error arguments. Instead of simply remanding the cases for a mathematical adjustment to the defendants' sentences, appellate courts will have to study the records to predict whether a jury would have found the sentence-enhancing facts at issue, had those facts been alleged and proven to the jury.

But the extra work generated in appellate courts will be just the beginning of the extra litigation that reversing here would spawn. The practical effect of upholding trial courts' *Blakely*-violative findings when appellate courts think the record supports such findings would be that defense counsel would be duty-bound to challenge every stray piece of prosecutorial evidence in criminal trials.

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[16] Although the State requests simply that this case "be remanded for a determination of whether the error was harmless," Petitioner's Br. at 27, the United States urges this Court to go ahead and decide whether the error was harmless. Respondent agrees with the State that if this Court holds that the *Blakely* error here is susceptible to harmless-error review, this case should be remanded for a determination of whether the error was harmless. This Court's "general custom" is to "allow[ ] state courts initially to assess the effect of [constitutional errors] in light of substantive state criminal law." *Lilly v. Virginia*, 527 U.S. 116, 139 (1999). That custom warrants following here. Contrary to the United States' suggestion (United States' Br. at 28), there is good reason to believe the error here could not be found harmless under any view of federal harmless-error law. The State never charged that Respondent used a "firearm," as that term is defined under Washington law. *See supra* at 16. And while the State presented evidence at trial that Respondent used a handgun during the assault, Respondent made clear he did not concede that gun was a "firearm." J.A. 38. Indeed, Respondent argued below that there is insufficient evidence in the record to support such a finding. *Id.*

Under our current system of adversarial justice, defense counsel needs to concern themselves with disputing only the elements of the offenses that the prosecution charges (and that the jury will decide). The practical effect of applying harmless error to these circumstances is to require defendants at trial to contest not only the offense charged and submitted to the jury, but also the elements of every greater offense, charged or uncharged, which the trial court might later decide has been proven by the government. And in abundance of caution, to defend against new elements that the trial court might never imagine lest they support a finding of harmless error on appeal.

The Sixth Amendment, as well as this Court's structural-error doctrine, simply forbids appellate courts from subjecting *Blakely* violations to harmless-error review. When such error occurs, an appellate court should simply vacate the "enhancement" and remand for resentencing consistent with the jury's verdict.

CONCLUSION

For the reasons stated above in Part I, this Court should consider dismissing this case as improvidently granted. In the alternative, this Court should affirm the decision of the Washington Supreme Court.

Respectfully submitted,

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January 18, 2006.

No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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IN THE

Supreme Court of the United States

No. 05-83

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONER

ARGUMENT IN REPLY

Recuenco does not dispute the propriety of this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), applying harmless error analysis to missing elements. Nor does Recuenco defend the reasoning of the Washington Supreme Court distinguishing *Neder*. Instead, the central theme of Recuenco's brief, and the idea upon which his arguments depend, is the claim that the error in this case, and all *Apprendi*[1] error, includes error in charging, such that when the judge instead of jury finds even a single sentence-enhancing fact, the judge has directed verdict on an uncharged crime. This claim is incorrect, both generally and as applied to Recuenco's case. His arguments ignore settled law

[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

that will prevent the abuses he foretells, and he fails to distinguish *Neder*.

I. *NEDER* AND *APPRENDI* ERROR ARE LEGALLY DISTINCT FROM CHARGING ERROR ANALYSIS.

1. Recuenco and his amicus curiae argue that unless *Apprendi* error is deemed structural error, judges will impose verdicts on a completely different crime than the crime charged, comparing the situation to a judge imposing a murder verdict when only manslaughter was charged. Brief for Respondent at 19.

The argument overlooks the constitutionally-based and well-established case law prohibiting conviction for an uncharged crime. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ." Const. amend VI. This Court has held that Sixth Amendment notice is insufficient if the defendant was "prejudicially surprised" by the claimed omission of an element. *United States v. Miller*, 471 U.S. 130, 134 (1985). *See generally* 4 W. LaFave, J. Israel, & N. King, Criminal Procedure §§ 19.2-19.3 (1999). This Court has also held, however, that a plain error analysis will apply where the defendant did not challenge the charging document at trial. *United States v. Cotton*, 535 U.S. 625 (2000).

Similarly, under the Washington State Constitution, an accused cannot be tried for an offense not charged. Washington const. art. I, § 22; *State v. Pelkey*, 109 Wash.2d 484, 487, 745 P.2d 854, 855-56 (1988). "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him," *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86, 88 (1991), but the charging document need not repeat the exact language of the statute.

State v. Leach, 113 Wash.2d 679, 686, 782 P.2d 552, 555 (1989). Where the defendant challenges the information prior to verdict, the language of the charging document is strictly construed to determine whether all elements are included, and the defendant need not show he was prejudiced by the defect. *State v. Johnson*, 119 Wash.2d 143, 149-50, 829 P.2d 1078, 1080-81 (1992). If the charging document is challenged post-verdict, however, the document will be liberally construed, or the defendant must show prejudice. *Kjorsvik*, 117 Wash.2d at 104-06, 812 P.3d at 91-92.

Thus, contrary to Recuenco's arguments, failure to hold that *Apprendi* error is structural will not eviscerate *Apprendi* and lead to verdicts on uncharged crimes, because under federal and state law, a defendant who is prejudiced by a deficient charging document may be entitled to relief under existing analyses that are independent of *Neder* or *Apprendi*. There is simply no reason to mix *Neder*'s harmless error analysis with the charging error analysis set forth above. To do so will unnecessarily complicate each analysis.

2. Moreover, Recuenco suggests that without a structural error rule for *Apprendi* error, *Apprendi* will be eviscerated and judges will impose verdicts on completely different crimes than the crimes charged. Brief for Respondent at 7, 19, 37-39; Brief of Amici Curiae the National Association of Criminal Defense Lawyers et al. ("Brief of Amici") at 11-21. The argument fails because there is no evidence whatsoever that the *Neder* or *Apprendi* rules have unleashed such judicial wantonness. The vast majority of appellate courts have applied harmless error review to *Neder* and *Apprendi* errors for six years,[2] yet Recuenco cannot show that harmless error

[2] Brief of the States as Amici Curiae in Support of Petitioner at 24-25 (listing *Neder* harmless error cases). Shortly after *Apprendi* was decided in 2000, appellate courts began applying harmless error review to *Apprendi* error. *See United States v. Bailey*, 270 F.3d 83, 88-89 (1st Cir. 2001); *United States v. Barbosa*, 271 F.3d 438, 459-61 (3rd Cir. 2001), *cert.*

review has led to any of the adverse consequences he foretells. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 n. 25 (2001) ("Noticeably absent from the parade of horribles is any indication that the 'potential for abuse' has ever ripened into a reality").

II. RECUENCO NEVER ALLEGED CHARGING ERROR, SO HE CANNOT PRESUME IT NOW.

1. The well-established body of law described above governing charging deficiencies in Washington has been used by countless appellate courts to resolve claims that a charging document was constitutionally insufficient. Yet, not once in the state appellate process did Recuenco cite to this line of authority, or seek to invoke its protections. Instead, he relied on *Apprendi* and *State v. Thomas*, 150 Wash.2d 821, 83 P.3d 970 (2004) (*Apprendi* error never subject to harmless error analysis). *See* Supplemental Brief of Petitioner in the Washington Supreme Court at 4-8. To be sure, Recuenco used the word "notice" in his briefing, but only in the very general sense that the term is used in *Apprendi* to indicate that the Sixth Amendment requires notice. But, since *Apprendi* did not involve a challenge to the charging document, and does not establish any analysis for defective charging documents, *Apprendi*, 530 U.S. at 477 n.3, citation to *Apprendi* and the use of the word "notice" does not establish a constitutional charging violation. Recuenco's claim was thus limited to a Fourteenth Amendment Due Process challenge of the type applied in *Neder*, *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely v. Washington*, 542 U.S. 296 (2004).

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denied, 537 U.S. 1049 (2002); *United States v Clinton*, 256 F.3d 311, 315-16 (5th Cir.), *cert. denied*, 534 U.S. 1008 (2001); *United States v. Adkins*, 274 F.3d 444, 454-56 (7th Cir. 2001), *cert. denied*, 537 U.S. 891 (2002); *United States v. Anderson*, 236 F.3d 427, 429-30 (8th Cir.), *cert. denied*, 534 U.S. 956 (2001); *State v. Davis*, 255 Conn. 782, 796, 772 A.2d 559, 568 (Conn. 2001); *People v. Amaya*, 321 Ill. App. 3d 923, 932, 748 N.E.2d 1251, 1259 (Ill. App. Ct. 2001).

His reasons were clearly strategic, as the strategy he chose was legally more attractive. If he pursued a claim under *State v. Thomas* he could invoke the Washington Supreme Court's "no harmless error for *Apprendi* error" rule, and the court would not examine the charging document at all—much less liberally construe it—and he would not have to prove prejudice. He could simply identify an *Apprendi* error, and obtain automatic reversal.

Recuenco's charging claim was weak under state law because he had not challenged the charging document before verdict, even though he clearly should have been on notice that a firearm sentence was going to be imposed. Under the liberal construction used to analyze alleged charging error, a Washington court would have found the information to be sufficient. *See, e.g., State v. Summers*, 107 Wash. App. 373, 380, 28 P.3d 780, 784 (2001) (finding that error in failing to allege knowledge element in firearm case was not reversible error when challenged for the first time on appeal), *modified on other grounds*, 43 P.3d 526 (2002).

Nor could Recuenco have shown that he was surprised by the evidence or the sentence. The information alleged that at the time of the crime Recuenco was armed with "a deadly weapon, to wit: a handgun." J.A. 3. Under Washington law at the time this case was tried, if a defendant was charged with a "deadly weapon" enhancement and if the weapon at issue was a firearm, the trial judge was *required* to impose the greater firearm enhancement. *State v. Rai*, 97 Wash. App. 307, 983 P.3d 712 (1999); *State v. Meggyesy*, 90 Wash. App. 693, 958 P.3d 318 (1998), *review denied*, 136 Wash.2d 1028, 972 P.2d 465 (1998). Accordingly, Washington case law made it clear that an information alleging use of a "deadly weapon" would require a firearm sentence if supported by the evidence.

Because Recuenco relied only on *Apprendi* in state court, and chose not to independently challenge notice under established Washington case law, the Washington Supreme Court never reached that issue, and it certainly did not hold that the charging document was inadequate.

Yet, Recuenco now pretends that the charging issue was resolved by the Washington court in his favor, repeatedly suggesting that he was not charged with a "firearm" enhancement, and citing language in the Washington court's "invited error" holding to support his claim. Brief for Respondent at 17. But the language in the court's invited error holding simply posits what Recuenco *may* have subjectively believed or wanted when he asked the court to instruct on the lesser weapon enhancement. This language cannot substitute for a holding on a distinct, constitutional, legal challenge to the charging document that was never raised. In short, Recuenco asks this court to presume the answer to a constitutional question that he never asked the Washington court to decide. Indeed, the Washington Supreme Court clearly framed the issue as whether *Apprendi* error had occurred, and whether it was harmless, just as Recuenco had asked. *See* Supplemental Brief of Petitioner in the Washington Supreme Court at 4-9. The way in which the Washington court framed the issue limits the claims presented for this Court's decision. Pet. App. 1a-2a.

As done in *Apprendi*, this Court should express no opinion on the charging issue, and should instead simply resolve the question squarely presented by this case—whether harmless error analysis is possible where a sentencing enhancement has been decided by a judge instead of a jury. The Washington Supreme Court has now repeated that holding in three separate published opinions, reversing cases against five defendants on a federal constitutional theory that is erroneous, squarely presented in this case, and that will continue to adversely affect sentences obtained under Washington's sen-

tencing scheme. *See* Petition at 17; Reply to Brief in Opposition at 4-5; Brief for Petitioner at 25-26.

2. Contrary to the assertions of Recuenco and Amici, Recuenco had ample motive at trial to contest the operability of the firearm in this particular case. A "handgun" was charged as a sentencing enhancement, the law of Washington at the time of trial permitted the judge to impose the firearm finding if supported by the evidence, and there was no dispute that Recuenco possessed a fully-loaded gun during the offense. Under these circumstances, it would have been apparent to anyone that a firearm sentence was going to be imposed, regardless of whether a judge or jury was going to make the finding.[3]

III. THE JURY'S SPECIAL VERDICT WAS TECHNICALLY INCOMPLETE, BUT IT WAS NOT "DIRECTED."

Recuenco makes two slightly different, and flawed, arguments alleging that the trial court directed the verdict in his case, and that without a structural error rule, presumably

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[3] The degree to which a firearm even needs to be operable is an open question under Washington law. *Compare State v. Faust*, 93 Wash. App. 373, 380, 967 P.2d 1284, 1288 (1998) (holding that the gun "need not be loaded or even capable of being fired to be a firearm") *with State v. Padilla*, 95 Wash. App. 531, 532, 978 P.2d 1113, 1114 (holding that "a gun rendered *permanently* inoperable is not a firearm" because it is not ever capable of being fired), *review denied*, 139 Wash.2d 1003, 989 P.2d 1142 (1999). Here, all evidence indicated operability. The gun was fully loaded, was kept by Recuenco in a ready location on a file cabinet in the living quarters of the residence, and Recuenco testified that he warned his children never to touch it. Tr. 5:236-37; 7:643-44; 8: 677. Ms. Recuenco also testified as to her fear of the gun. Tr. 6: 497-98. Also, any argument that the gun was inoperable would have undercut Recuenco's legal argument (at trial and on appeal, *see* Pet. App. 12a-17a) for a jury instruction on the lesser crime of Aiming a Firearm. Wash. Rev. Code § 9.41.230(1)(a).

applying only to *Apprendi* error, judges will continue to impose such directed verdicts. Brief for Respondent at 20-25.

Recuenco derives his "directed verdict" argument from a misinterpretation of that term as used in *Rose v. Clark*, 478 U.S. 570, 578 (1986), where this Court said that "harmless error analysis presumably would not apply if a court directed verdict for the prosecution in a criminal trial by jury." *Id.* But, in context, this quote was hypothesizing a judge entering a judgment of conviction on an entire criminal charge. Under such circumstances, the jury trial right is "*altogether* denied." *Id.* In *Rose v. Clark*, however, this Court found harmless error where the jury had been instructed to *presume* that the element of malice had been proved if it found certain facts. *Id.* The Court affirmed because "no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury." *Id.* at 580-81 (italics in original). This Court expressly rejected the "directed verdict" analogy in *Rose v. Clark*, *id.*, and again in *Neder* where it held a court could conduct harmless error review when an element was omitted from the jury instructions. *Neder*, 527 U.S. at 17 n.2.

So, too, in this case no rational jury could have found Recuenco was armed with a deadly weapon without concluding he was armed with a firearm. The special verdict form was not sufficiently precise but the jury's decision was clear. The trial court did not direct a verdict and altogether deny Recuenco a fair trial under the Sixth Amendment. Instead, the court simply imposed the verdict that the jury necessarily found based on the evidence and the verdict it rendered.

IV. *NEDER* ERROR AND *APPRENDI* ERROR ARE INDISTINGUISHABLE.

Recuenco attempts to distinguish *Neder* in a variety of respects but each is tied to his central argument that *Apprendi* error is different than *Neder* error because *Apprendi* error

necessarily includes error in charging, instruction, and sentencing, and thus "permeates" trial, whereas *Neder* cases involve mere instructional error that is more limited and quantifiable. Brief for Respondent at 7, 19. *See also* Brief of Amici at 4-11. This claim is fatally flawed for numerous reasons. Charging defects can occur as to both elements and sentencing enhancements, so charging does not distinguish *Neder* error from *Apprendi* error.

1. Errors related to offense elements often occur because neither the court nor the parties recognized that a fact was an element for the jury. When that is the case, it often follows that the missing element was not set forth in the charging documents. For instance, after this Court held in the second part of *Neder* that a scheme to defraud under the wire and mail fraud statutes included the element of material falsehood, 527 U.S. at 25, defendants filed federal appeals claiming that failure to include this element in the indictment, in jury instructions, or in both, was reversible error. *See, e.g., United States v. Bieganowksi*, 313 F.3d 264, 285-86 (5th Cir. 2002) (addressing claim that materiality element of mail fraud was not properly alleged in indictment), *cert. denied*, 528 U.S. 1014 (2003); *United States v. Fernandez*, 282 F.3d 500, 508-09 (7th Cir.) (addressing claim that materiality element of mail fraud was neither alleged in indictment nor included in the jury instructions), *cert. denied*, 537 U.S. 1028 (2002); *United States v. Gee*, 226 F.3d 885, 891-92 (7th Cir. 2000) (same).[4] Thus, in many cases, the new holding triggered both charging error *and Neder* error.

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[4] *See also State v Anderson*, 141 Wash.2d 357, 359, 5 P.3d 1247, 1249 (2000) (holding that the crime of unlawful possession of a firearm included an implied element of knowledge). *Anderson* triggered appeals claiming errors in both the charging document and the "to convict" instruction. *See, e.g., State v Warfield*, 119 Wash. App. 871, 873, 80 P.3d 625, 627 (2003) (finding error in omitting element from jury instructions and information).

Likewise, charging deficiencies can occur in *Apprendi*-type cases where a sentence enhancement has been decided by a judge but not submitted to a jury. *See Mitchell v. Esparza*, 540 U.S. 12, 14 (2003) ("principal offender" death penalty aggravator omitted from indictment but used to impose sentence of death); *United States v. Cotton*, 535 U.S. 625 (2002) (indictment charged conspiracy to distribute a "detectable amount" of cocaine but sentence enhanced based on conspiracy to distribute at least 50 grams).

Yet, neither the *Neder* nor the *Apprendi* line of cases depends on the adequacy of the charging document. In fact, this Court noted that Apprendi's challenge was based on "'due process of law' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). ("Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment"). The Court distinguished indictment errors under the Fifth Amendment, and general notice claims raised in state courts under the Due Process Clause of the Fourteenth Amendment. *Id.* at 477 n.3.

Likewise, in *Ring v. Arizona*, this Court noted that it was not addressing any issue concerning notice. 536 U.S. 534, 597 n.4 (2002) ("Ring does not contend that his indictment was constitutionally defective."). And in *Blakely v. Washington*, although it appears that Blakely was not charged with the aggravating factors, 542 U.S. at 298-99, neither this Court nor the Washington Supreme Court analyzed Blakely's claim as a charging deficiency. *Id.* at 296, 301. Thus, charging deficiencies do not always accompany *Apprendi* error, and they do not permeate the entire structure of the trial in a way that is distinct from *Neder* error. Recuenco's alleged distinction is illusory, and thus cannot justify a different harmless error rule for *Apprendi*-type cases.

Recuenco and Amici also make the related argument that harmless error analysis is inappropriate here because counsel may have adopted a different approach to development of the record had he known he was facing the firearm enhancement. In the general sense, this argument is faulty because it again purports to turn on the notice question. But as discussed, *supra* at 9-10, a defendant without notice of either an element *or* a sentencing enhancement might try the case differently if he knew the charge he was facing. Thus, this argument fails to distinguish *Neder* error from *Apprendi* error. Notice issues can be independently challenged to determine whether counsel was prejudiced by the charging document. An ambiguous charging document might influence a reviewing court's decision to find an error harmless, but it does not provide a reason to categorically preclude harmless error analysis.

2. Recuenco also claims that *Apprendi* error is unique because a judge deciding a sentencing enhancement is elevating an existing conviction to a higher degree in a manner that does not occur when a judge decides an element. This claim is mistaken. Many jurisdictions divide offenses into degrees. When *Neder* error occurs, it can obviously involve the element that distinguishes one degree of crime from another degree. As a result of such error, the jury will have been properly instructed only on the elements that establish the lesser crime. See, e.g. *State v. Mills*, 154 Wash.2d 1, 109 P.3d 415 (2005) (error in jury instructions concerning the "threat to kill" element—an element that elevated a misdemeanor to felony). But there is no authority that *Neder* error occurring in this situation is different and less susceptible to harmless error review than an error affecting another element of the crime. In fact, it is difficult to understand why it would be more offensive to conduct harmless error review when the missing element elevates the crime from a lower degree to a higher degree than when the elements expressly found by the jury do not establish any crime at all, as occurred in *Neder*.

In any event, the artificiality of the Washington Supreme Court's distinction between *Neder* and *Apprendi* is illustrated by *State v. Thomas*, 150 Wash.2d 821, 83 P.3d 970 (2004). In *Thomas*, the court examined an erroneous accomplice liability instruction that affected the jury's verdicts on both the substantive crime of murder, and the death penalty aggravating circumstance. Applying *Neder*, the Washington Supreme Court affirmed the murder conviction but reversed the death sentence, holding that the same accomplice liability error that was harmless as to an element was not subject to any harmless error analysis with respect to the aggravating circumstance. *State v. Thomas*, 150 Wn.2d at 845-49, 83 P.3d at 983-84. Because charging distinctions do not support the court's different rule, and because the approach in *Sullivan v. Louisiana*, 508 U.S. 275 (1993) has been rejected, there is simply no reason to distinguish *Neder* error from *Apprendi* error for harmless error analysis.

As courts and state legislatures respond to *Apprendi* and *Blakely*, the distinction between elements and sentencing enhancements has become even less clear, suggesting that a different harmless error rule depending on labels will be very difficult to apply. For instance, in light of *Apprendi*, some courts now characterize facts previously viewed as sentencing enhancements as elements of the crime. *See United States v. Thomas*, 274 F.3d 655, 673 (2nd Cir. 2001) (holding that, in light of *Apprendi*, drug type and quantity are elements of the offense under 21 U.S.C. § 841); *United States v. Lott*, 310 F.3d 1231, 1238-39 (10th Cir. 2002) (same); *State v. Upton*, 339 Or. 673, 681, 125 P.3d 713, 718 (Or. 2005) (holding that "each aggravating or enhancing factor encompassed with the sentencing guideline statute is essentially a new element of an aggravated form of the underlying offense."). Under the Washington Supreme Court's approach, this difference in label will be very significant for harmless error review.

Also, the Washington state legislature amended its sentencing scheme after *Blakely* to provide Sixth Amendment protections for sentencing enhancements, including advance notice of aggravating circumstances for exceptional sentences, and providing that most aggravating circumstances shall be presented to the jury during the trial on the charged crime. 2005 Wash. Laws ch. 68. *See also* Alaska Stat. § 12.55.155 (2005); Ariz. Rev. Stat. §§ 13-702, 13-702.01 (2005); Minn. Stat. § 244.10 (2005); N.C. Gen. Stat. § 15A-1340.16 (2005). Under these new procedures, is an error in instructing the jury on an aggravating circumstance a *Neder* error or an *Apprendi* error? One can only imagine the litigation that will occur as counsel characterize the error in conflicting ways to take advantage of different standards of review. A single harmless error rule as set forth in *Neder* would avoid much wrangling and gamesmanship.

3. Indeed, recognizing the similarities between *Neder* claims and *Apprendi* claims, the vast majority of courts have concluded that *Apprendi* or *Blakely* errors are subject to harmless error review. *See* Petition for a Writ of Certiorari at 10-16. And the same reasons that supported the adoption of harmless error in *Chapman v. California*, 386 U.S. 18 (1967), and its application in *Neder*, apply to *Apprendi* error. The rule will promote respect for the law by focusing on the underlying fairness of the trial rather than the inevitable presence of immaterial error; it will ensure that criminal cases are decided on the merits and not on the basis of defects that have no bearing on the jury's verdict; and it will conserve judicial resources by avoiding unnecessary remands or retrials. *See* Brief for Petitioner at 11-15.

In providing for increased penalties for the use of a firearm, the people of the State of Washington intended that defendants like Recuenco would receive more severe punishment than those committing assault without the use of a firearm. As this Court observed in *Cotton* when applying plain

error review to the failure to allege a sentencing enhancement in the indictment, "the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments." *Cotton*, 535 U.S. at 634. The identical concerns and reasoning apply here: there was overwhelming and uncontroverted evidence that Recuenco was armed with a loaded firearm. This Court has adopted harmless error analysis to avoid exactly what occurred here—the reversal of a sentence for an error that had no effect on the outcome of the case.

State v. Williams, 2006 WL 224278, No. 23124-1-III (Wash. Ct. App. filed Jan. 31, 2006) illustrates quite vividly how the Washington courts' approach undermines the principles of the justice system, and the principles of harmless error review. Williams shot and killed a man and was charged with, *inter alia*, first-degree murder. The information alleged that Williams was armed with a *firearm* during commission of the offense. 2006 WL 224278, at *6. (italics added). Williams was convicted as charged. Because the special verdict form only asked if he was armed with a deadly weapon, the court reversed the firearm enhancement observing that, "while it would seem that the harmless error doctrine would easily accommodate this error, that is not the holding of *Recuenco*." *Id.* Had the jury been improperly instructed on the element of premeditation to commit murder, however, the error would have been subject to harmless error review.

In sum, Recuenco fails to distinguish *Apprendi* error from *Neder* error. The same harmless error rule should apply to both types of Sixth Amendment violation.

V. CERTIORARI WAS PROPERLY GRANTED.

Recuenco argues that certiorari may have been improvidently granted, claiming that harmless error review is improper in this case because there is no valid procedure under Washington state law to request a jury to make a firearm

finding. Brief for Respondent at 8-15. In essence, he claims that the firearm enhancement statute is facially unconstitutional such that an appellate court cannot affirm the enhancement by conducting harmless error review. This new argument should be rejected for several reasons.

1. First, this state-law argument was waived, as it was belatedly made for the first time in the Brief for Respondent. Recuenco never claimed before any Washington state court that there was no valid procedure for seeking firearm enhancements. And, in opposition to the petition for certiorari, Recuenco described the relevant statute as requiring a jury finding: "Wash[.] Rev. Code §9.94A.533(3) provides for the imposition of confinement *where the jury finds* the defendant committed the offense with a firearm." Brief in Opposition at 2 (emphasis added).[5]

This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). The Court normally does not consider arguments that were not presented in a brief in opposition, much less arguments that were not even raised in the courts below. *See Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998); *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999). Because Recuenco did not raise this objection to the question presented earlier, the Court should deem it waived. Sup. Ct. R. 15.2.

2. The Washington Supreme Court squarely addressed the appropriateness of harmless error review for the federal constitutional error—an issue that Recuenco now claims

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[5] Apparently recognizing this defect, Recuenco insists that he raised the issue in his Brief in Opposition, and cites to a section in that brief where he cited to the court's language in *Recuenco* about the limited relief upon *remand*. *See* Brief for Respondent at 9 n. 5. He never claimed, however, that there is ***no*** valid statutory procedure to submit the firearm question to the jury at all, which is his present claim.

should have been irrelevant. After holding that "without an explicit firearm finding by the jury, the court's imposition of a firearm sentence enhancement violated Recuenco's jury trial rights," Pet. App. 6a, the court addressed the constitutional harmless error question. Pet. App. 8a. The court's decision referred to the lengthy analysis in the *Hughes* decision, all of which was based upon the court's interpretation of federal constitutional law. *State v. Hughes*, 154 Wash.2d 118, 142-48, 110 P.3d 192, 204-08 (2002).

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court adopted a standard for evaluating whether a state-court decision rested upon an adequate and independent state ground.

> [When] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-41; *see also Arizona v. Evans*, 514 U.S. 1, 7-8 (1995). Here, the Washington Supreme Court's decision clearly identifies the federal constitution as the basis for its refusal to conduct harmless error review; the court did not even suggest that the decision was based upon state law grounds.

Even if Recuenco's interpretation of Washington state law is correct, his claim does not establish that *Apprendi* error is structural. At best, it shows that the error here is not harmless. Contrary to Recuenco's argument,[6] an *Apprendi* error is "either structural or . . . not." *Neder v. United States*, 527

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[6] Brief for Respondent at 6-7 ("Even if *Apprendi/Blakely* errors could be harmless under other circumstances, there is no way they can be harmless here.").

U.S. at 14. This Court rejected "a case-by-case approach" in determining whether an error was structural, because "that is more consistent with our traditional harmless-error inquiry (*i.e.*, whether an error is harmless)." *Id.* Here, the Washington Supreme Court based its decision on the broad principle that all *Apprendi* error is structural. *Pet. App.* 8a ("*Blakely* Sixth Amendment violations . . . can never be deemed harmless."). The fact that a court might find error not harmless based on an alleged quirk in state law does not mean that *Apprendi* error is structural error.

3. Recuenco's new interpretation of Washington State law is also meritless as a matter of state law. The notion that the State is prohibited from submitting a firearm enhancement to a jury is not supported by the *Recuenco* opinion, the *Hughes* opinion, or any subsequent Washington case. Recuenco's sole basis for this claim is the following sentence: "Because we held in *Hughes* that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict." Pet App. 8a. Nowhere in the opinion did the court suggest or imply that Washington law prohibited submission of the firearm enhancement to the jury at all stages of the proceedings. If this was the court's conclusion, it would have been a radical departure from existing law, invalidating a commonly used sentencing enhancement.[7] The court was

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[7] In Washington, trial courts have regularly submitted the question of whether the defendant was armed with "a firearm" to the jury. *See, e.g., State v. Barnes*, 153 Wash.2d 378, 383, 103 P.3d 1219, 1222 (2005) (rejecting challenge to special verdict form for firearm enhancement); *State v. Burke*, 90 Wash. App. 378, 383, 952 P.2d 619, 621 (1998) (special verdict required that jury find that the defendant was armed with a firearm). Only a few years after the firearm enhancement provisions were enacted, the Washington Supreme Court Committee on Jury Instructions prepared standard jury instructions for submitting the firearm enhancement to the

only referring to the procedure *on remand*, not at original trials.

Hughes, cited in *Recuenco*, provides no support for Recuenco's argument. *Hughes* recognized a distinction between procedures at a remanded sentencing hearing and an original trial. *Hughes* addressed a wholly different type of sentencing enhancement under the exceptional sentence provisions of Washington's Sentencing Reform Act, and held that the State could not specially empanel a jury at a new sentencing hearing to find aggravating circumstances. The court carefully limited its ruling to the issue of procedures at a sentencing hearing *upon remand* and did not opine whether the aggravating circumstances could be presented to the jury in an original trial: "We are presented only with the question of the appropriate remedy on remand—we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." *Hughes*, 154 Wash.2d at 149-50, 110 P.3d at 208.[8] *Hughes* cannot be read as prohibiting a jury decision on all sentencing enhancements at a trial.

Even if the Washington Supreme Court had held in *Hughes* that exceptional sentence aggravators could not be presented at *any* jury trial, such a holding would not control the firearm enhancement, which is governed by a different sentencing statute. In *Hughes*, the Court observed that the exceptional sentence statute explicitly required the court, not the jury, to find the aggravating circumstances: "This situation is distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a

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jury. 11 Washington Pattern Jury Instructions: Criminal 10.01, at 15-16 (2nd ed. Supp. 1998).

[8] The Washington Supreme Court is presently considering the separate issue of whether the State could prove aggravating circumstances as part of an original trial. *State v. Pillatos et al*, No. 75984-7. Deadly weapon and firearm enhancements are not at issue.

necessary procedure." *Hughes*, 154 Wash.2d at 151, 110 P.3d at 209. The statute governing the deadly weapon enhancement is different in just that way—it expressly provides that the deadly weapon enhancement question should be submitted to the jury. Wash. Rev. Code § 9.94A.602; Former Wash. Rev. Code § 9.94A.125 ("if a jury trial is had . . . the jury shall . . . find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon . . ."). The statute defines a firearm as a deadly weapon. *Id.* At best, the statute is silent on whether the jury may be asked if the deadly weapon is a firearm. The language and rationale of *Hughes* do not support the claim that the firearm enhancement may not be submitted to the jury.

Moreover, since the *Recuenco* and *Hughes* decisions, no Washington appellate court has held that the firearm enhancement cannot be submitted to the jury. Indeed, the Washington Supreme Court has affirmed sentences since *Recuenco* that included firearm enhancements found by juries. *See State v. Louis*, 155 Wash.2d 563, 566-67, 120 P.3d 936, 937-38 (2005); *State v. Cubias*, 155 Wash.2d 549, 550, 120 P.3d 929, 930 (2005). Likewise, the Washington Court of Appeals upheld a firearm enhancement against a challenge based upon *Recuenco* because the jury instructions stated that the jury had to find that "the defendant was armed with a *firearm* at the time of the commission of the crime." *State v. Pharr*, ___ Wash. App. ___, 126 P.3d 66, 69 (2006) (emphasis added). Under Recuenco's interpretation of Washington law, all of these decisions have affirmed illegal sentences.

4. Finally, Recuenco notes that he has served his sentence but he does not argue that the case is moot for that reason. Brief for Respondent at 6. In fact, Recuenco was released in March 2003, five months before he sought review in the Washington Supreme Court. The length of Recuenco's sentence and the fact that a special firearm enhancement was imposed may have any number of collateral consequences.

The firearm finding makes Recuenco ineligible in the future to participate in mental health court or drug court in Washington state. *See* Wash. Rev. Code § 2.28.170(3)(b)(iii)(c); Wash. Rev. Code § 2.28.180(3)(b)(iii)(c). And a previous conviction for a violent offense involving a firearm is an aggravating factor under the federal death penalty statute. 18 U.S.C. § 3592(c)(2). Similarly, a prior offense involving "firearms use" also counts as a serious violent offense under the federal "three strikes" statute. 18 U.S.C. § 3559(c)(2)(F)(i). Collateral consequences may also include the setting of bail and the length of the sentence in any future criminal case, or the possibility of a pardon. *See Minnesota v. Dickerson*, 508 U.S. 366, 371 n.2 (1993) (rejecting mootness claim because of the possible collateral legal consequences even though charges had been dismissed after completion of probation); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 n. 3 (1977) (rejecting mootness argument because defendant had served his sentence). Recuenco was sufficiently concerned about these collateral consequences of the firearm finding that he aggressively pursued state court review of his sentence, even after it had been served. This issue is not moot—certiorari was properly granted.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WASHINGTON *v.* RECUENCO

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 05–83. Argued April 17, 2006—Decided June 26, 2006

After respondent threatened his wife with a handgun, he was convicted of second-degree assault based on the jury's finding that he had assaulted her "with a deadly weapon." A "firearm" qualifies as a "deadly weapon" under Washington law, but nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." Nevertheless, the state trial court applied a 3-year firearm enhancement to respondent's sentence, rather than the 1-year enhancement that specifically applies to assault with a deadly weapon, based on the court's own factual findings that respondent was armed with a firearm. This Court then decided *Apprendi* v. *New Jersey*, 530 U. S. 466, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.*, at 490, and *Blakely* v. *Washington*, 542 U. S. 296, clarifying that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*," *id.*, at 303. Because the trial court could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded a Sixth Amendment *Blakely* violation before the Washington Supreme Court, but urged the court to find the *Blakely* error harmless. In vacating respondent's sentence and remanding for sentencing based solely on the deadly weapon enhancement, however, the court declared *Blakely* error to be "structural error," which will always invalidate a conviction under *Sullivan* v. *Louisiana*, 508 U. S. 275, 279.

Held:

1. Respondent's argument that this Court lacks power to reverse

because the Washington Supreme Court's judgment rested on adequate and independent state-law grounds is rejected. It is far from clear that respondent is correct that at the time of his conviction, state law provided no procedure for a jury to determine whether a defendant was armed with a firearm, so that it is impossible to conduct harmless-error analysis on the *Blakely* error in his case. The correctness of respondent's interpretation, however, is not determinative of the question the State Supreme Court decided and on which this Court granted review, *i.e.*, whether *Blakely* error can ever be deemed harmless. If respondent's reading of Washington law is correct, that merely suggests that he will be able to demonstrate that the *Blakely* violation *in this particular case* was not harmless. See *Chapman* v. *California*, 386 U. S. 18, 24. But it does not mean that *Blakely* error—which is of the same nature, whether it involves a fact that state law permits to be submitted to the jury or not—is structural, or that this Court is precluded from deciding that question. Thus, the Court need not resolve this open question of Washington law. Pp. 3–4.

2. Failure to submit a sentencing factor to the jury is not "structural" error. If a criminal defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that most constitutional errors are subject to harmless-error analysis. *E.g.*, *Neder* v. *United States*, 527 U. S. 1, 8. Only in rare cases has this Court ruled an error "structural," thus requiring automatic reversal. In *Neder*, the Court held that failure to submit an element of an offense to the jury—there, the materiality of false statements as an element of the federal crimes of filing a false income tax return, mail fraud, wire fraud, and bank fraud, see *id.*, at 20–25—is not structural, but is subject to *Chapman*'s harmless-error rule, *id.*, at 7–20. This case is indistinguishable from *Neder*. *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony . . . and a 'sentencing factor' was unknown . . . during the years surrounding our Nation's founding." 530 U. S., at 478. Accordingly, the Court has treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Id.*, at 483–484. The only difference between this case and *Neder* is that there the prosecution failed to prove the materiality element beyond a reasonable doubt, while here the prosecution failed to prove the "armed with a firearm" sentencing factor beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with *Apprendi*'s recognition that elements and sentencing factors must be treated the same. Respondent attempts unpersuasively to distinguish *Neder* on the ground that the jury there returned a guilty verdict on the offenses for which the defendant was sentenced, whereas here the jury returned a guilty verdict only on the offense of

Syllabus

second-degree assault, and an affirmative answer to the sentencing question whether respondent was armed with a deadly weapon. Because Neder's jury did not find him guilty of each of the elements of the offenses with which he was charged, its verdict is no more fairly described as a complete finding of guilt than is the verdict here. See 527 U. S., at 31. Pp. 5–9.

154 Wash. 2d 156, 110 P. 3d 188, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, BREYER, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion. GINSBURG, J., filed a dissenting opinion, in which STEVENS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–83

WASHINGTON, PETITIONER *v.* ARTURO R. RECUENCO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[June 26, 2006]

JUSTICE THOMAS delivered the opinion of the Court.

Respondent Arturo Recuenco was convicted of assault in the second degree based on the jury's finding that he assaulted his wife "with a deadly weapon." App. 13. The trial court applied a 3-year firearm enhancement to respondent's sentence based on its own factual findings, in violation of *Blakely* v. *Washington*, 542 U. S. 296 (2004). On appeal, the Supreme Court of Washington vacated the sentence, concluding that *Blakely* violations can never be harmless. We granted certiorari to review this conclusion, 546 U. S. ___ (2005), and now reverse.

I

On September 18, 1999, respondent fought with his wife, Amy Recuenco. After screaming at her and smashing their stove, he threatened her with a gun. Based on this incident, the State of Washington charged respondent with assault in the second degree, *i.e.*, "intentiona[l] assault . . . with a deadly weapon, to-wit: a handgun." App. 3. Defense counsel proposed, and the court accepted, a special verdict form that directed the jury to make a specific finding whether respondent was "armed with a deadly

weapon at the time of the commission of the crime." *Id.*, at 13. A "firearm" qualifies as a "'deadly weapon'" under Washington law. Wash. Rev. Code §9A.04.110(6) (2006). But nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." The jury returned a verdict of guilty on the charge of assault in the second degree, and answered the special verdict question in the affirmative. App. 10, 13.

At sentencing, the State sought the low end of the standard range sentence for assault in the second degree (three months). It also sought a mandatory 3-year enhancement because respondent was armed with a "firearm," §9.94A.533(3)(b), rather than requesting the 1-year enhancement that would attend the jury's finding that respondent was armed with a deadly weapon, §9.94A.533(4)(b). The trial court concluded that respondent satisfied the condition for the firearm enhancement, and accordingly imposed a total sentence of 39 months.

Before the Supreme Court of Washington heard respondent's appeal, we decided *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Blakely*, *supra*. In *Apprendi*, we held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490. In *Blakely*, we clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U. S., at 303 (emphasis in original). Because the trial court in this case could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded before the Supreme Court of Washington that a Sixth Amendment violation occurred under *Blakely*. 154

Wash. 2d 156, 162–164, 110 P. 3d 188, 191 (2005). See also Tr. of Oral Arg. 10–11.

The State urged the Supreme Court of Washington to find the *Blakely* error harmless and, accordingly, to affirm the sentence. In *Washington* v. *Hughes*, 154 Wash. 2d 118, 110 P. 3d 192 (2005), however, decided the same day as the present case, the Supreme Court of Washington declared *Blakely* error to be "'structural' erro[r]" which "'will always invalidate the conviction.'" *Id.*, at 142, 110 P. 3d 205 (quoting *Sullivan* v. *Louisiana*, 508 U. S. 275, 279 (1993)). As a result, the court refused to apply harmless-error analysis to the *Blakely* error infecting respondent's sentence. Instead, it vacated his sentence and remanded for sentencing based solely on the deadly weapon enhancement. 154 Wash. 2d, at 164, 110 P. 3d, at 192.

II

Before reaching the merits, we must address respondent's argument that we are without power to reverse the judgment of the Supreme Court of Washington because that judgment rested on adequate and independent state-law grounds. Respondent claims that at the time of his conviction, Washington state law provided no procedure for a jury to determine whether a defendant was armed with a firearm. Therefore, he contends, it is impossible to conduct harmless-error analysis on the *Blakely* error in his case. Respondent bases his position on *Hughes*, in which the Supreme Court of Washington refused to "create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly assigned such findings to the trial court." 154 Wash. 2d, at 151, 110 P. 3d, at 209. Respondent contends that, likewise, the Washington Legislature provided no procedure by which a jury could decide at trial whether a defendant was armed with a firearm, as opposed to a deadly weapon.

It is far from clear that respondent's interpretation of Washington law is correct. See *Washington* v. *Pharr*, 131 Wn. App. 119, 124-125, 126 P. 3d 66, 69 (2006) (affirming the trial court's imposition of a firearm enhancement when the jury's special verdict reflected a finding that the defendant was armed with a firearm). In *Hughes*, the Supreme Court of Washington carefully avoided reaching the conclusion respondent now advocates, instead expressly recognizing that "[w]e are presented only with the question of the appropriate remedy on *remand*—we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." *Id.*, at 149, 110 P. 3d, at 208. Accordingly, *Hughes* does not appear to foreclose the possibility that an error could be found harmless because the jury which convicted the defendant would have concluded, if given the opportunity, that a defendant was armed with a firearm.

The correctness of respondent's interpretation of Washington law, however, is not determinative of the question that the Supreme Court of Washington decided and on which we granted review, *i.e.*, whether *Blakely* error can ever be deemed harmless. If respondent is correct that Washington law does not provide for a procedure by which his jury could have made a finding pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation *in this particular case* was not harmless. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). But that does not mean that *Blakely* error—which is of the same nature, whether it involves a fact that state law permits to be submitted to the jury or not—is structural, or that we are precluded from deciding that question. Thus, we need not resolve this open question of Washington law.[1]

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[1] Respondent's argument that, as a matter of *state* law, the *Blakely* v. *Washington*, 542 U. S. 296 (2004), error was not harmless remains open

III

We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder* v. *United States*, 527 U. S. 1, 8 (1999) (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 306 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" 527 U. S., at 8 (quoting *Rose* v. *Clark*, 478 U. S. 570, 579 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal.[2] In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, *supra*, at 9 (emphasis omitted).

We recently considered whether an error similar to that which occurred here was structural in *Neder*, *supra*. Neder was charged with mail fraud, in violation of 18 U. S. C. §1341; wire fraud, in violation of §1343; bank fraud, in violation of §1344; and filing a false income tax return, in violation of 26 U. S. C. §7206(1). 527 U. S., at 6. At Neder's trial, the District Court instructed the jury that it "'need not consider'" the materiality of any false statements to convict Neder of the tax offenses or bank fraud,

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to him on remand.

[2]See *Neder* v. *United States*, 527 U. S. 1, 8 (1999) (citing *Johnson* v. *United States*, 520 U. S. 461, 468 (1997), in turn citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) (defective reasonable-doubt instruction)).

because materiality "'is not a question for the jury to decide.'" *Ibid.* The court also failed to include materiality as an element of the offenses of mail fraud and wire fraud. *Ibid.* We determined that the District Court erred because under *United States* v. *Gaudin*, 515 U. S. 506 (1995), materiality is an element of the tax offense that must be found by the jury. We further determined that materiality is an element of the mail fraud, wire fraud, and bank fraud statutes, and thus must be submitted to the jury to support conviction of those crimes as well. *Neder*, 527 U. S., at 20. We nonetheless held that harmless-error analysis applied to these errors, because "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.*, at 9. See also *Schriro* v. *Summerlin*, 542 U. S. 348, 355–356 (2004) (rejecting the claim that *Ring* v. *Arizona*, 536 U. S. 584 (2002), which applied *Apprendi* to hold that a jury must find the existence of aggravating factors necessary to impose the death penalty, was a "'"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding,'" in part because we could not "confidently say that judicial factfinding *seriously* diminishes accuracy").

The State and the United States urge that this case is indistinguishable from *Neder*. We agree. Our decision in *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U. S., at 478 (footnote omitted). Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Id.*, at 483–484. The only difference between this case and *Neder* is that in *Neder*, the prosecution failed

to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes.[3]

Respondent attempts to distinguish *Neder* on the ground that, in that case, the jury returned a guilty verdict on the offense for which the defendant was sentenced. Here, in contrast, the jury returned a guilty verdict only on the offense of assault in the second degree, and an affirmative answer to the sentencing question whether respondent was armed with a deadly weapon. Accordingly, respondent argues, the trial court's action in his case was the equivalent of a directed verdict of guilt on an offense (assault in the second degree while armed with a firearm) greater than the one for which the jury convicted him (assault in the second degree while armed with any deadly weapon). Rather than asking whether the jury would have returned the same verdict absent the error, as in *Neder*, respondent contends that applying harmless-error analysis here would "'hypothesize a guilty verdict that [was] never in fact rendered,'" in violation of the jury-trial guarantee. Brief for Respondent at 27 (quoting *Sul-*

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[3]Respondent also attempts to evade *Neder* by characterizing this as a case of charging error, rather than of judicial factfinding. Brief for Respondent 16–19. Because the Supreme Court of Washington treated the error as one of the latter type, we treat it similarly. See 154 Wash. 2d 156, 159–161, 110 P. 3d 188, 189–190 (2005) (considering "whether imposition of a firearm enhancement without a jury finding that Recuenco was armed with a firearm beyond a reasonable doubt violated Recuenco's Sixth Amendment right to a jury trial as defined by *Apprendi* v. *New Jersey*, 530 U. S. 466 [(2000)], and its progeny," and whether the *Apprendi* and *Blakely* error, if uninvited, could "be deemed harmless").

livan, 508 U. S., at 279).

We find this distinction unpersuasive. Certainly, in *Neder*, the jury purported to have convicted the defendant of the crimes with which he was charged and for which he was sentenced. However, the jury was precluded "from making a finding on the *actual* element of the offense." 527 U. S., at 10. Because Neder's jury did not find him guilty of each of the elements of the offenses with which he was charged, its verdict is no more fairly described as a complete finding of guilt of the crimes for which the defendant was sentenced than is the verdict here. See *id.*, at 31 (SCALIA, J., concurring in part and dissenting in part) ("[S]ince all crimes require proof of more than one element to establish guilt . . . it follows that trial by jury means determination by a jury that *all elements* were proved. The Court does not contest this"). Put another way, we concluded that the error in *Neder* was subject to harmless-error analysis, even though the District Court there not only failed to submit the question of materiality to the jury, but also mistakenly concluded that the jury's verdict was a complete verdict of guilt on the charges and imposed sentence accordingly. Thus, in order to find for respondent, we would have to conclude that harmless-error analysis would apply if Washington had a crime labeled "assault in the second degree while armed with a firearm," and the trial court erroneously instructed the jury that it was not required to find a deadly weapon or a firearm to convict, while harmless error does not apply in the present case. This result defies logic.[4]

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[4]The Supreme Court of Washington reached the contrary conclusion based on language from *Sullivan*. See *Washington* v. *Hughes*, 154 Wash. 2d 118, 144, 110 P. 3d 192, 205 (2005) ("There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can

* * *

Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error. Accordingly, we reverse the judgment of the Supreme Court of Washington, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

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operate'" (quoting *Sullivan*, 508 U. S., at 279–280)). Here, as in *Neder*, "this strand of reasoning in *Sullivan* does provide support for [respondent]'s position." 527 U. S., at 11. We recognized in *Neder*, however, that a broad interpretation of our language from *Sullivan* is inconsistent with our case law. 527 U. S., at 11–15. Because the jury in *Neder*, as here, failed to return a complete verdict of guilty beyond a reasonable doubt, our rejection of Neder's proposed application of the language from *Sullivan* compels our rejection of this argument here.

SUPREME COURT OF THE UNITED STATES

No. 05–83

WASHINGTON, PETITIONER *v.* ARTURO R. RECUENCO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[June 26, 2006]

JUSTICE KENNEDY, concurring.

The opinions for the Court in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), *Blakely* v. *Washington*, 542 U. S. 296 (2004), and their progeny were accompanied by dissents. The Court does not revisit these cases today, and it describes their holdings accurately. On these premises, the Court's analysis is correct. Cf. *Ring* v. *Arizona*, 536 U. S. 584, 613 (2002) (KENNEDY, J., concurring). With these observations I join the Court's opinion.

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No. 05–83

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[June 26, 2006]

JUSTICE STEVENS, dissenting.

Like *Brigham City* v. *Stuart*, 547 U. S. ___ (2006), and *Kansas* v. *Marsh*, 548 U. S. ___ (2006), this is a case in which the Court has granted review in order to make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution. Ironically, the issue in this case is not whether respondent's federal constitutional rights were violated—that is admitted—it is whether the Washington Supreme Court's chosen remedy for the violation is mandated by federal law. As the discussion in Part II of the Court's opinion demonstrates, whether we even have jurisdiction to decide that question is not entirely clear. But even if our expansionist post-*Michigan* v. *Long* jurisprudence supports our jurisdiction to review the decision below, see 463 U. S. 1032 (1983), there was surely no need to reach out to decide this case. The Washington Supreme Court can, of course, reinstate the same judgment on remand, either for the reasons discussed in Part II of the Court's opinion, see *ante*, at 4, and n. 1, or because that court chooses, as a matter of state law, to adhere to its view that the proper remedy for *Blakely* errors, see *Blakely* v. *Washington*, 542 U. S. 296 (2004), is automatic reversal of the unconstitutional portion of a defendant's sentence. Moreover, because the Court does not

address the strongest argument in respondent's favor—namely, that *Blakely* errors are structural because they deprive criminal defendants of sufficient notice regarding the charges they must defend against, see *ante*, at 7, n. 3—this decision will have a limited impact on other cases.

As I did in *Brigham City* and *Marsh*, I voted to deny certiorari in this case. Given the Court's decision to reach the merits, however, I would affirm for the reasons stated in JUSTICE GINSBURG's opinion, which I join.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[June 26, 2006]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

Between trial and sentencing, respondent Arturo Recuenco's prosecutor switched gears. The information charged Recuenco with assault in the second degree, and further alleged that at the time of the assault, he was armed with a deadly weapon. App. 3. Without enhancement, the assault charge Recuenco faced carried a sentence of 3 to 9 months, *id.*, at 15; Wash. Rev. Code §§9.94A.510, 9A.36.021(1)(c) (2004); the deadly weapon enhancement added one mandatory year to that sentence, §9.94A.533(4)(b).[1] The trial judge instructed the jury on both the assault charge and the deadly weapon enhancement. App. 7, 8. In connection with the enhancement, the judge gave the jurors a special verdict form and instructed them to answer "Yes or No" to one question only: "Was the defendant . . . armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?" *Id.*, at 13. The jury answered: "Yes." *Ibid.*

Because the deadly weapon Recuenco held was in fact a

[1]Since Recuenco was charged, some of the relevant statutory provisions have been renumbered, without material revision. For convenience, we follow the Court's and the parties' citation practice and refer to the current provisions.

handgun, the prosecutor might have charged, as an alternative to the deadly weapon enhancement, that at the time of the assault, Recuenco was "armed with a firearm." That enhancement would have added three mandatory years to the assault sentence. §9.94A.533(3)(b). The information charging Recuenco, however, did not allege the firearm enhancement. The jury received no instruction on it and was given no special verdict form posing the question: Was the defendant armed with a firearm at the time of the commission of the crime of Assault in the Second Degree? See 154 Wash. 2d 156, 160, 110 P. 3d 188, 190 (2005) ("The jury was not asked to, and therefore did not, return a special verdict that Recuenco committed the assault while armed with a firearm.").

The prosecutor not only failed to charge Recuenco with assault while armed with a firearm and to request a special verdict tied to the firearm enhancement. He also informed the court, after the jury's verdict and in response to the defendant's motion to vacate: "The method under which the state is alleging and the jury found the assaul[t] committed was by use of a deadly weapon." App. 35. Leaving no doubt, the prosecutor further clarified: "[I]n the crime charged and the enhancement the state alleged, there is no elemen[t] of a firearm. The element is assault with a deadly weapon." *Ibid.* Recuenco was thus properly charged, tried, and convicted of second-degree assault while armed with a deadly weapon. It was a solid case; no gap was left to fill.

Nevertheless, at sentencing, the prosecutor requested, and the trial judge imposed, a three-year mandatory enhancement for use of a firearm. *Ibid.* Recuenco objected to imposition of the firearm enhancement "without notice . . . and a jury finding." 154 Wash. 2d, at 161, 110 P. 3d, at 190. Determining that there was no warrant for elevation of the charge once the trial was over, the Washington Supreme Court "remand[ed] for resentencing based

solely on the deadly weapon enhancement which is supported by the jury's special verdict." *Id.*, at 164, 110 P. 3d, at 192. I would affirm that judgment. No error marred the case presented at trial. The prosecutor charged, and the jury found Recuenco guilty of, a complete and clearly delineated offense: "assault in the second degree, being armed with a deadly weapon." The "harmless-error" doctrine was not designed to allow dislodgment of that error-free jury determination.

I

Under Washington law and practice, assault with a deadly weapon and assault with a firearm are discrete charges, attended by discrete instructions. As the Court observes, *ante*, at 2, a charge of second-degree assault while armed with a deadly weapon, §9.94A.533(4)(b), subjects a defendant to an additional year in prison, and a charge of second-degree assault while armed with a firearm, §9.94A.533(3)(b), calls for an additional term of three years. "Deadly weapon," Washington law provides, encompasses any "implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death," including, *inter alia*, a "pistol, revolver, or any other firearm." §9.94A.602. "Firearm" is defined, more particularly, to mean "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." §9.41.010(1). A handgun (the weapon Recuenco held), it thus appears, might have been placed in both categories.[2]

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[2]But see App. 38. When the prosecutor, post-trial but presentence, made it plain that he was seeking the three-year firearm enhancement rather than the one-year deadly weapon enhancement, Recuenco objected that the statutory definition of "firearm" had not been read to the jury, and that the prosecutor had submitted no evidence showing that Recuenco's handgun was "designed to fire a projectile by explosive

Washington Pattern Jury Instructions, Criminal (WPIC) (West 2005 Supp.), set out three instructions for cases in which "an enhanced sentence is sought on the basis that the defendant was armed with a 'deadly weapon,'" WPIC §2.06 (note on use): Deadly Weapon–General, §2.07; Deadly Weapon–Knife, §2.07.01; Deadly Weapon–Firearm, §2.07.02. When the prosecutor seeks an enhancement based on the charge that "the defendant was armed with a 'firearm,'" §2.06, trial courts are directed to a different instruction, one keyed to the elevated enhancement, §2.10.01.

Matching special verdict forms for trial-court use are also framed in the WPIC. When a "deadly weapon" charge is made, whether generally or with a knife or firearm, the prescribed form asks the jury: "Was the defendant (defendant's name) armed with a deadly weapon at the time of the commission of the crime [in Count __]?" §190.01. When a "firearm" charge is made, the jury is asked: "Was the defendant (defendant's name) armed with a firearm at the time of the commission of the crime [in Count __]?" §190.02.

In Recuenco's case, the jury was instructed, in line with the "deadly weapon" charge made by the prosecutor, App. 6–7, and the special verdict form given to the jury matched that instruction. The form read:

> "We, the jury, return a special verdict by answering as follows:
>
> "Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?
>
> "ANSWER: [YES] (Yes or No)." *Id.*, at 13.

No "firearm" instruction, WPIC §2.10.01 (West 2005

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such as gunpowder." *Ibid.*

Supp.), was given to Recuenco's jury, nor was the jury given the special verdict form matching that instruction, §190.02; see *supra*, at 3–4, n. 2.

III

In the Court's view, "this case is indistinguishable from *Neder* [v. *United States*, 527 U. S. 1 (1999)]." *Ante*, at 6. In that case, the trial judge made a finding necessary to fill a gap in an incomplete jury verdict. One of the offenses involved was tax fraud; the element missing from the jury's instruction was the materiality of the defendant's alleged misstatements. Under the mistaken impression that materiality was a question reserved for the court, the trial judge made the finding himself. In fact in *Neder*, materiality was not in dispute. See 527 U. S., at 7; see also *id.*, at 15 (Neder "d[id] not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed."). "Reversal without any consideration of the effect of the error upon the verdict would [have] sen[t] the case back for retrial—a retrial not focused at all on the issue of materiality, but on contested issues on which the jury [had been] properly instructed." *Ibid.* The Court concluded that the Sixth Amendment did not command that recycling.

Here, in contrast to *Neder*, the charge, jury instructions, and special verdict contained no omissions; they set out completely all ingredients of the crime of second-degree assault with a deadly weapon. There is no occasion for any retrial, and no cause to displace the jury's entirely complete verdict with, in essence, a conviction on an uncharged greater offense.

III

The standard form judgment completed and signed by the trial judge in this case included the following segment:

"**SPECIAL VERDICT OR FINDING(S)**:

"(b) [ ] A special verdict/finding for being armed with a **Firearm** was rendered on Count(s) ___.

"(c) **[X]** A special verdict/finding for being armed with a **Deadly Weapon** other than a firearm was rendered on Count(s) I." App. 14.

Count I was identified on the judgment form as "ASSAULT IN THE 2ND DEGREE." *Ibid.* Despite the "X" placed next to the "Deadly Weapon" special verdict/finding, and the blanks left unfilled in the "Firearm" special verdict/finding lines, the trial judge imposed a sentence of 39 months (3 months for the assault, 36 months as the enhancement).

Had the prosecutor alternatively charged both enhancements, and had the judge accurately and adequately instructed on both, giving the jury a special verdict form on each of the two enhancements, the jury would have had the prerogative to choose the lower enhancement. Specifically, the jury could have answered "Yes" (as it in fact did, see *supra*, at 4) to the "armed with a deadly weapon" inquiry while returning no response to the alternative "firearm" inquiry. See, *supra*, at 3, and n. 2 (Washington's statutory definition of "deadly weapon" overlaps definition of "firearm"); cf. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 573 (1977) ("[R]egardless of how overwhelmingly the evidence may point in that direction[, t]he trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."). Today's decision, advancing a greater excluded (from jury control) offense notion, diminishes the jury's historic capacity "to prevent the punishment from getting too far out of line with the crime." *United States* v. *Maybury*, 274 F. 2d 899, 902 (CA2 1960) (Friendly, J.); see also *Blakely* v. *Washington*, 542 U. S. 296, 306 (2004) (recognizing jury's role "as circuitbreaker in the State's machinery of justice").

* * *

In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments, made applicable to the States by the Fourteenth Amendment. I would therefore affirm the judgment of the Supreme Court of the State of Washington.